

HAWAII ADMINISTRATIVE RULES

TITLE 12 DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

SUBTITLE 7

BOARDS

CHAPTER 46

CIVIL RIGHTS COMMISSION

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SUBCHAPTER 1

PROCEDURE ON COMPLAINTS

§12-46-1 Definitions. As used in this chapter, unless the context otherwise requires:

"Aggrieved person" means any person who shall be adversely affected by an action, decision, order, or rule of the commission or who shall be adversely affected by the action or conduct of any person if the action or conduct is within the commission's jurisdiction.

"Ancestry" means national origin; an individual's or ancestor's place of origin; or the physical, cultural, or linguistic characteristics of an ethnic group.

"Attorney general" means the state attorney general or any deputy of the state attorney general.

"Because of sex" shall be as defined in section 378-1, HRS.

"Bona fide retirement, pension, employee benefit, or insurance plan" means any plan, program, or policy of an employer, including any retirement, pension, or insurance plan, which is in writing and has been communicated to eligible or affected employees and which is not a pretext for age discrimination. The plan shall have the intent and purpose of providing an employee with insurance during employment or with income upon retirement.

"Commission" means the civil rights commission established by sections 368-2 and 368-3, HRS.

"Complaint" means a written statement filed with the commission pursuant to this chapter and section 368-11, HRS, alleging an unlawful discriminatory practice within the meaning of chapter 368 or 489 or 515 or part I of chapter 378, HRS.

"Complainant" means the person who has filed a complaint pursuant to this chapter.

"Declaratory relief" means the commission's declaration as to the applicability or non-applicability with respect to a factual situation of any rule or order of the commission, or of a statute which the commission is required to administer or enforce.

"Demonstrates" means meets the burdens of production and persuasion.

"EEOC" means the United States Equal Employment Opportunity Commission or any of its designated representatives.

"Employer" shall be as defined in section 378-1, HRS.

"Employment" shall be as defined in section 378-1, HRS.

"Employment agency" shall be as defined in section 378-1, HRS.

"Executive director" means the executive director appointed by the commission pursuant to section 368-3, HRS, or the executive director's designee.

"Fringe benefits" includes medical, hospital, accident, life insurance and retirement benefits, profit-sharing and bonus plans, leave, and other terms, conditions, and privileges of employment.

"Hearings examiner" means a person, duly appointed by the commission pursuant to section 368-3, HRS, and authorized to hold a hearing for the purpose of taking evidence or oral argument, and making a decision in any case or controversy within the jurisdiction of the commission.

"Hearings relief" means the determination by the commission of the legal rights, duties, or privileges of specific parties which are required by law to be determined after an opportunity for agency hearing.

"HRS" means Hawaii Revised Statutes.

"Investigating examiner" means the person designated by the executive director to conduct an investigation of a complaint.

"Labor organization" shall be as defined in section 378-1, HRS.

"Marital status" shall be as defined in section 378-1, HRS.

"Party" means the commission, if named, permitted, or entitled as of right to participate in a proceeding, each person named in a proceeding, or any interested or aggrieved person permitted or entitled as of right to participate in a proceeding before the commission in the capacity of a petitioner, complainant, respondent, intervenor, or in a capacity other than that of a witness.

"Person" means individuals, partnerships, corporations, associations, or public or private organizations of any character, other than the commission.

"Petition" means an application to the commission by a party which seeks relief pursuant to this chapter.

"Petitioner" means a party who files a petition with the

commission pursuant to this chapter.

"Religion" includes all aspects of religious observance, practice, and belief.

"Religious accommodation" means an affirmative duty to reasonably resolve a conflict resulting from an employee's or prospective employee's religious observance or practice with the terms or conditions of employment.

"Religious practice" includes moral or ethical beliefs, which are sincerely held with the strength of traditional religious views.

"Remedy" means any remedy in section 368-17, HRS, including any punitive damages award determined pursuant to standards prescribed by the Hawaii Supreme Court.

"Respondent" means the party against whom the complaint or petition is filed, the party against whom relief is sought, or any party who contests or controverts a proceeding or petition.

"Rule" shall have the same meaning as provided in section 91-1(4), HRS.

"Rule relief" means the adoption, modification, or repeal of any regulatory rule by the commission.

"Sex" means the state of being male or female and the conditions associated therewith.

"Single" means the state of being unmarried, divorced, separated, or widowed.

"706 agency" means a state or local agency which the EEOC has determined satisfies the criteria stated in section 706(c) of Title VII (42 U.S.C. §2000e-5(c)).

"Title VII" means Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-17).

"Unlawful discriminatory practice" includes the term "unfair discriminatory practice," or like terms, as may be used in chapters 368, 489, 515, and part I of chapter 378, HRS. [Eff 12/31/90; am 5/1/92; am 11/4/93] (Auth: HRS §368-3) (Imp: HRS §368-3)

§12-46-2 Purpose. (a) This subchapter sets forth the procedures for the administration and enforcement of chapters 368, 489, 515 and part I of chapter 378, HRS.

These rules shall be liberally construed to accomplish the purposes of these chapters. [Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §368-3)

§12-46-3 Computation of time. The time in which any act provided by this chapter is to be done is computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, or holiday and then it is also excluded. As used in this chapter, "holiday" includes any day designated as such pursuant to

section 8-1, HRS. [Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §368-3).

§12-46-4 General inquiry. (a) Whenever it appears to the commission's executive director that an unlawful discriminatory practice may have been committed, the executive director may make an inquiry without the filing of a complaint.

(b) The commission's executive director may file a complaint whenever the inquiry has revealed an unlawful discriminatory practice under chapter 368 or 489 or 515 or part I of chapter 378, HRS.

(c) The information gathered in the course of an inquiry which occurred prior to the filing of a complaint may be used in processing the complaint. [Eff 12/31/90; am 5/1/92] (Auth: HRS §368-3) (Imp: HRS §§368-3, 368-11).

§12-46-5 Filing of complaint. (a) Any person claiming to be aggrieved by an alleged unlawful discriminatory practice may file a complaint.

(b) The commission's executive director may file a complaint whenever there is reason to believe that any person, employer, employment agency, or labor organization has engaged or is engaging in an unlawful discriminatory practice.

(c) The commission's executive director or the attorney general may file a complaint on behalf of a class where an unlawful discriminatory practice raises questions of law or fact which are common to the class and where a class action complaint is superior to other available methods for the fair and efficient adjudication of the controversy. A complaint so filed may be investigated, conciliated, and litigated on a class basis.

(d) Assistance in drafting and filing complaints is available to complainants at the commission's offices.

(e) The complaint shall be in writing and, where feasible, upon forms furnished by the commission's executive director. The complaint shall be signed.

(f) The original and two copies of the complaint shall be filed by personal delivery or by mail, addressed to the commission.

(g) When the complainant is unable to personally deliver or mail a timely complaint, the commission may receive a facsimile copy, if legible, of a complaint containing the information required by section 12-46-6. Notwithstanding the provisions of section 12-46-6(b), complaints are deemed filed on the date of receipt of the facsimile copy if the complainant complies with section 12-46-5(f) within seven days of the receipt of the facsimile. If the commission does not receive the original and two copies of the complaint within seven days, the filing date will be the date when the commission

received them. [Eff 12/31/90; am 5/1/92; am 11/4/93] (Auth: HRS §368-3) (Imp: HRS §368-11)

§12-46-6 Contents of complaint. (a) Each complaint shall contain the following:

- (1) The full name, address, and telephone number (if any) of complainant;
- (2) The full name, address, and telephone number (if any, and if known) of the respondent or respondents;
- (3) A plain and concise statement of the facts constituting the alleged unlawful discriminatory practice;
- (4) The date or dates on which the alleged unlawful discriminatory practice occurred; or if the alleged unlawful discriminatory practice is of a continuing nature, the dates between which the continuing acts of discrimination are alleged to have occurred; or the dates and acts commenced;
- (5) If known, the approximate number of employees of the employer, or the approximate number of members of the labor organization, as the case may be; and
- (6) Other information as required by the commission's executive director.

(b) Notwithstanding the provisions of subsection (a), a complaint is deemed filed if the commission receives from an individual a written statement sufficiently precise to identify the parties and describing with reasonable accuracy the action or practices alleged to be unlawful. [Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §368-11)

§12-46-6.1 Amendments. (a) Prior to the commencement of proceedings before the hearings examiner, the executive director may permit the parties, including the Attorney General and executive director, to amend documents filed with the Commission, including a complaint or responsive statement. After commencement of proceedings, amendments may be granted by the hearings examiner.

(b) An amendment may be made:

- (1) To cure technical defects or omissions; or
- (2) To clarify or amplify allegations, to add new causes of action or defenses, or add new parties.

(c) Amendments shall relate back to the original filing date of the document.

(d) The amending party shall promptly serve upon the other party a copy of the amended document. [Eff 5/1/92] (Auth: HRS §368-3) (Imp: HRS §368-11)

§12-46-7 Service of complaint. (a) Within ten days after a complaint is filed with the commission, or within ten days after the commission receives a complaint on deferral from the EEOC, the commission's executive director shall serve a copy of the complaint on the respondent by certified mail, return receipt requested, or by personal delivery, except when it is determined by the executive director that providing a copy of the complaint would impede the law enforcement functions of the commission.

(b) Where a copy of the complaint is not provided, the respondent shall be served with a notice of the complaint, including the date, place, and general description of the alleged unlawful discriminatory practice, within ten days after filing of the complaint.

(c) Providing the respondent with a copy of the complaint shall be deemed to impede the law enforcement functions of the commission where:

- (1) The complaint names more than one respondent, unless the respondents are charged jointly; e.g., an employer and a union are charged with having signed a collective bargaining agreement which is discriminatory; or
- (2) The complaint names a person or persons whom the commission believes may suffer retaliation or may be construed as being confidential informers or potential confidential informers;

(d) When a complaint is written and filed in a language other than English the commission shall provide for an English translation of the complaint which shall be served along with any copy of the original complaint filed with the commission.

[Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §368-11).

§12-46-8 Withdrawal of complaint. (a) Upon request of the complainant, a complaint, or any part thereof, may be withdrawn only if the written consent of the commission's executive director is obtained.

(b) When requesting withdrawal of a complaint, the complainant shall:

- (1) Submit the request in writing;
- (2) Set forth fully the reasons for the request; and
- (3) Sign the request.

(c) The commission's executive director shall notify the respondent of the withdrawal. [Eff 12/31/90; am 5/1/92] (Auth: HRS §368-3) (Imp: HRS §368-11)

§12-46-9 Deferral of complaints filed with EEOC. (a) In accordance with section 706(c) of Title VII, complaints received by

the EEOC alleging unlawful discriminatory practices concurrently regulated by Title VII and chapter 378, HRS, are deferred to the commission for a sixty-day period during which time the commission, as a 706 agency, has the exclusive right to process complaints alleging discrimination filed by a person other than a commissioner of the EEOC.

(b) At the expiration of the sixty-day period, although the commission retains jurisdiction to process the deferred complaint, the EEOC may begin to process the complaint through its own procedures.

(c) The commission shall follow the same procedures in processing deferrals as it uses in processing complaints originally filed with the commission

(d) The commission may waive its right to the period of exclusive processing of complaints provided under section 706(c) of Title VII with respect to any complaint or category of complaints.

(e) A complaint initially filed with the EEOC and deferred to the commission in accordance with section 706(c) of Title VII shall be deemed filed with the commission as of the date the complaint was received by the EEOC for purposes of the statute of limitations set forth in Section 368-11(c), HRS, but shall otherwise be deemed filed with the commission when received by the commission. [Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §368-11; 42 U.S.C. §2000e-5(c))

§12-46-10 Jurisdiction over complaints filed with commission.

(a) Complaints originally received by the commission shall be governed by the following procedures unless the commission has entered into an agreement with the EEOC that provides otherwise.

(b) When the complaint alleges an unlawful discriminatory practice over which the commission and the EEOC have concurrent jurisdiction, the commission's executive director shall:

- (1) Furnish the appropriate district office of EEOC with a copy of the complaint and state whether the commission will investigate it or terminate proceedings; and
- (2) Notify the complainant that the complaint has been filed with EEOC.

(c) Complaints over which the commission has no jurisdiction, but which are within the jurisdiction of the EEOC, shall be immediately referred to the EEOC.

(d) If the complaint is within the commission's jurisdiction but is not subject to the jurisdiction of the EEOC, the commission shall assume exclusive jurisdiction over the complaint upon receipt. [Eff 12/31/90] (Auth: HRS 368-3) (Imp: HRS §368-11; 42 U.S.C. §2000e-5(c))

§12-46-11 Dismissal of complaint. (a) The executive director shall dismiss the complaint:

- (1) If it is determined that the commission does not have jurisdiction over the complaint;
- (2) If it is determined after investigation that reasonable cause does not exist to believe that the alleged unlawful discriminatory practice has been committed;
- (3) If either the complainant or respondent cannot be located; provided that reasonable efforts have been made to locate the complainant or respondent, or the complainant has not responded within thirty days to a notice sent by the commission to the complainant's last known address;
- (4) If the complainant has failed or is unable to cooperate fully in the investigation or conciliation of a complaint by:
 - (A) Failing or refusing to provide the investigating examiner with requested information;
 - (B) Failing or refusing to appear or to be available for interview or conferences as an investigating examiner deems necessary; or
 - (C) Otherwise refusing or failing to cooperate, or not being able to provide information which a person would reasonably be expected to have;to the extent that the commission's executive director or investigating examiner is unable to resolve the complaint; provided that after due notice of the commission's executive director's intent to dismiss the complaint, the complainant has had thirty days in which to respond;
- (5) If the executive director determines that there are inadequate remedies because:
 - (A) The respondent to the complaint has filed a petition for relief under Chapter VII of the Bankruptcy Code, Title 11 United States Code, and the executive director determines that there are insufficient assets available to provide relief to the complainant and other remedies are inappropriate; or
 - (B) There is no significant monetary, employment, accommodation, service, housing, declaratory, or injunctive relief available to the complainant;
- (6) If the complaint has been investigated by an appropriate local, state, or federal enforcement agency, such as the Equal Employment Opportunity Commission, Department of Housing and Urban Development, Office for Civil Rights, or Office of Federal Contract Compliance Programs, and a final determination regarding the complaint has been made

by the agency;

- (7) If it is determined at any time that, based upon the executive director's discretion, dismissal is justified for administrative reasons, such as but not limited to:
 - (A) A finding of reasonable cause is no longer appropriate because of a material change in the allegations of the complainant or respondent;
 - (B) A finding of reasonable cause is no longer appropriate because of a material change in the testimony of a key witness for the complainant or respondent; or
 - (C) A finding of reasonable cause is no longer appropriate because of a change in law or the discovery of new and material evidence; or
- (8) If the complaint or relief sought is covered by a court order or consent decree, or the respondent action complained of is required or authorized by a court order or consent decree.

(b) The executive director may dismiss a complaint if the respondent has made a predetermination settlement offer as described in section 12-46-13, which is in writing and specific in its terms, and the complainant refuses to accept the offer; provided that the offer, as determined by the commission's executive director, would afford a just resolution for the harm alleged by the complainant and the complainant fails to accept the offer within thirty days after actual notice of the offer.

(c) In the event of any dismissal of a complaint:

- (1) The complainant shall be notified by certified mail, return receipt requested, of:
 - (A) The reason or reasons for dismissal;
 - (B) The right to sue as provided by section 368-12 or 515-9, HRS; and
 - (C) The right to request the commission to reconsider the dismissal.
- (2) The respondent and the commission shall be notified in writing of the dismissal and the reasons therefor.

(d) The dismissal of a complaint may be reconsidered on the executive director's own initiative at any time or upon the complainant's written request filed within thirty days after the date of the receipt of the notice of disposition. Written notice of the reconsideration shall be provided by the executive director to the parties. [Eff 12/31/90; am 5/1/92; am 11/4/93; am 5/3/99] (Auth: HRS §368-3) (Imp: HRS §§368-11, 368-12, 368-13, 515-9)

§12-46-12 Investigation, fact-finding conference, and

discovery. (a) After the filing of a complaint, the executive director shall investigate the charges contained in the complaint. In complaints alleging violations of chapter 515, HRS, investigations shall be commenced within thirty days after filing.

(b) As part of its investigation, the executive director may require all parties to attend a fact-finding conference.

(c) The fact-finding conference is primarily for the purposes of:

- (1) Ascertaining the positions of the parties;
- (2) Identifying the issues in dispute;
- (3) Resolving those issues that can be resolved;
- (4) Obtaining evidence; and
- (5) Determining the likelihood of a predetermination settlement.

(d) The commission's executive director is authorized to issue subpoenas for the production of documents or the examination of witnesses deemed necessary for the investigation of a complaint. The executive director can require parties to provide written responses to a complaint and other requests for information or discovery, including but not limited to, interrogatories and requests for admissions or for the production of documents.

(e) If a party or a witness refuses to honor a subpoena or if a party fails to respond to a complaint or discovery requests within the time allowed for such responses under the Hawaii Rules of Civil Procedure, the commission's executive director is authorized to file a petition for appropriate temporary relief in the circuit court.

(f) An investigation shall be concluded within one hundred eighty days of the filing of a complaint alleging violations of chapters 368, 378, or 489, HRS, or within one hundred days of the filing of a complaint alleging violations of chapter 515, HRS; provided that the commission may grant an extension. In complaints alleging violations of chapter 515, HRS, complainants and respondents shall be provided written notice if the investigation cannot be completed within one hundred days. [Eff 12/31/90; am 5/1/92; am 11/4/93] (Auth: HRS §368-3) (Imp: HRS §§368-13, 515-9)

§12-46-13 Predetermination settlement. (a) At any time after the filing of a complaint, but prior to the issuance of a determination, the executive director may encourage the parties to resolve the complaint through a predetermination settlement.

(b) If the complainant and the respondent agree to the terms of settlement, the settlement shall be reduced to writing, and be signed by the parties and the executive director. If approved, the case will be closed without a finding on the merits of the complaint and a copy of the final predetermination settlement shall be sent by

certified mail, return receipt requested, to the complainant and the respondent.

(c) If a predetermination settlement is achieved, the terms thereof shall not attribute fault to any of the parties involved.

(d) The commission shall not subject either party to prejudice as a result of the party's either participating or refusing to participate in a predetermination settlement attempt.

(e) Participation by the respondent in a predetermination settlement attempt will not be construed as evidence of a violation of the applicable chapter or part of HRS or a waiver of the right to a commission determination on the issues raised by the complaint if a settlement cannot be achieved.

(f) A predetermination settlement shall not affect the processing of any other complaint, including, but not limited to, a commission initiated complaint or a complaint in which the allegations are like or related to the individual allegations settled. [Eff 12/31/90; am 5/1/92] (Auth: HRS §368-3) (Imp: HRS §368-13)

§12-46-14 Notice of determination, conference, conciliation, and persuasion. (a) When the executive director finds reasonable cause to believe that an unlawful discriminatory practice has occurred or is occurring, the commission's executive director shall notify the parties of this determination. For complaints alleging violations of chapter 515, HRS, the executive director shall also notify the parties that an election may be made to file a civil action in lieu of an administrative hearing.

(b) The executive director shall immediately endeavor to eliminate the unlawful discriminatory practice by conference, conciliation, and persuasion.

(c) The executive director may require any or all parties to attend a conciliation conference for the purpose of attempting to informally resolve the matter. The parties shall be notified of time and place of the conciliation conference.

(d) Should a respondent fail or refuse to confer and otherwise cooperate with the commission's executive director, or fail or refuse to make a good faith effort to resolve any dispute, the commission's executive director shall terminate efforts to conciliate the dispute. In that event, the commission's executive director shall send the respondent a demand letter and a proposed conciliation agreement in accordance with section 12-46-17. [Eff 12/31/90; am 5/1/92; am 11/4/93] (Auth: HRS §368-3) (Imp: HRS §§368-13, 515-9)

§12-46-15 Conciliation agreement. (a) In attempting to conciliate a case after a determination of reasonable cause has been

made, the executive director shall endeavor to achieve a resolution of all violations found and to obtain agreement that the respondent shall eliminate the unlawful discriminatory practice and provide appropriate relief.

(b) Where conciliation efforts are successful, the terms of the conciliation shall be reduced to a written agreement which shall be signed by the parties and the executive director; provided that, in the judgment of the executive director, the agreement provides full and fair relief to the complainant. A copy of the signed conciliation agreement shall be sent to the parties.

(c) Where the case has been referred to a hearings examiner, the parties shall not enter into a conciliation agreement without the approval of the commission's executive director.

(d) Where the complainant has refused to accept a proposed conciliation agreement, the commission's executive director and the respondent may enter into a conciliation agreement to which the complainant is not a party if the agreement does not affect the complainant's rights and if, in the commission's executive director's opinion, the agreement provides for:

- (1) A just resolution of all violations found;
- (2) The elimination of the unlawful discriminatory practice;
and
- (3) Appropriate affirmative action.

In that event, the commission's executive director shall close the case without the complainant's consent, shall issue a notice of right to sue, and report this action to the commission.

(e) The commission's executive director may refuse to approve a conciliation agreement, even though the individual parties have agreed on the proposed terms, if the commission's executive director believes the remedies outlined in the agreement are inadequate to eliminate the unlawful discriminatory practice complained of or fail to provide appropriate affirmative action. In that event, the case may be closed as having been settled on terms not approved by the commission's executive director and the commission need not take any action to enforce the agreement if its terms are violated.

(f) A proposed conciliation agreement shall be enclosed when a demand letter is sent to the respondent in accordance with section 12-46-17(b).

(g) Any agreement which conciliates alleged violations of chapter 515, HRS, shall be subject to the approval of the commission and shall be made public unless the complainant and respondent otherwise agree and the commission determines that disclosure is not required to further purposes of such chapter. [Eff 12/31/90; am 5/1/92; am 11/4/93] (Auth: HRS §368-3) (Imp: HRS §§368-12, 368-13, 515-18)

§12-46-16 Compliance review and reports. (a) Proof of a respondent's compliance with the applicable chapter or part of HRS in accordance with the terms of the predetermination settlement, conciliation agreement, or order shall be obtained by the commission's executive director before the case is closed.

(b) In order to obtain proof of compliance, the commission's executive director may require any party to submit to it reports that the commission deems necessary to show the manner of compliance with the terms of the predetermination settlement, conciliation agreement, or order. [Eff 12/31/90; am 5/1/92] (Auth: HRS §368-3) (Imp: HRS §§368-15, 368-17)

§12-46-17 Demand letter. (a) If the commission's executive director has been unable to eliminate the alleged unlawful discriminatory practice through conference, conciliation, and persuasion within one hundred eighty days of the filing of a complaint alleging violations of chapters 368, 378, or 489, HRS, or within one hundred days of the filing of a complaint alleging violations of chapter 515, HRS, or within an extended period of time granted by the commission, the commission's executive director shall terminate conciliation efforts.

(b) The commission's executive director, upon termination of conciliation efforts, shall send the respondent:

(1) A letter by certified mail, return receipt requested, or by personal service, demanding that the respondent:

(A) Cease and desist from engaging in the alleged unlawful discriminatory practices; and

(B) Take appropriate remedial action; and

(2) A proposed conciliation agreement, containing a provision requiring the respondent to report on the manner of compliance with the proposed conciliation agreement.

(c) Within fifteen days after receipt of the demand letter and the proposed conciliation agreement, the respondent shall either:

(1) Sign the conciliation agreement as written and return it to the commission; or

(2) Request, in writing, the continuation of conciliation efforts, stating in the request good cause why conciliation should continue. The commission's executive director may grant or deny the request.

(d) If the respondent does not either sign and return the enclosed conciliation agreement or request the continuation of conciliation efforts within fifteen days after receiving the demand letter, or if the respondent requests the continuation of conciliation efforts, yet no conciliation agreement can subsequently be secured, the commission's executive director shall find that

conciliation efforts will not resolve the complaint and shall give written notice to the complainant, respondent, and commission of such finding. [Eff 12/31/90; am 5/1/92; am 8/18/94] (Auth: HRS §368-3) (Imp: HRS §368-13, §368-14)

§12-46-18 Commencement of proceedings before hearings examiner. A proceeding shall commence by the appointment of a hearings examiner either fifteen days after service of the final conciliation demand or after the expiration of any continuation of conciliation efforts granted pursuant to section 12-46-17. The hearings examiner shall docket the complaint and assign a docket number to the complaint. [Eff 12/31/90; am 11/4/93] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-19 Scheduling conference. (a) Within thirty days after the appointment of the hearings examiner the hearings examiner shall order the holding of a scheduling conference. All parties receiving notice of the scheduling conference shall attend in person or by counsel and shall be prepared to discuss the following subjects:

- (1) Anticipated motions, and deadlines as to the filing and hearing of motions;
- (2) Anticipated discovery;
- (3) Further proceedings, including setting dates for the prehearing conference and hearing;
- (4) Prospects for settlement; and
- (5) Any other matters which may be conducive to the just, efficient and economical determination of the proceeding, including the definition or limitation of issues. [Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §368-3)

§12-46-20 Notice of right to sue. (a) A notice of right to sue shall authorize:

- (1) A complainant alleging violations of chapters 368, 378, or 489, HRS, to bring a civil suit pursuant to section 368-12, HRS, within ninety days after receipt of the notice;
- (2) A complainant alleging violations of chapter 515, HRS, issued such notice before a finding of reasonable cause pursuant to section 515-9(2), HRS, to bring a civil suit within ninety days of receipt of the notice or one year after the filing of the complaint, whichever is later; or
- (3) The executive director to file a civil suit within ninety days of the receipt of the notice of right to sue by a party filing a timely notice of election to file civil action under subsection (b)(3) or one year after the

filing of the complaint, whichever is later.

(b) A request, in writing, may be made to the executive director to issue a notice of right to sue:

- (1) At any time after the filing of a complaint with the commission, and no later than three days after the conclusion of the scheduling conference provided for in section 12-46-19, by a complainant alleging violations of chapters 368, 378, or 489, HRS;
- (2) At any time after the filing of a complaint with the commission but before a finding of reasonable cause under section 515-9(2), HRS, by a complainant alleging violations of chapter 515, HRS; or
- (3) Within twenty days after receipt of the notice of election to file a civil action under section 515-9(3), HRS, by any party to a complaint alleging violations of chapter 515, HRS.

(c) The commission's executive director shall issue a notice of right to sue provided that the commission has not:

- (1) Previously issued a notice;
- (2) Entered into a conciliation agreement to which the complainant is a party; or
- (3) Filed a civil action.

(d) The commission's executive director shall issue a notice of right to sue:

- (1) Upon dismissal of the complaint pursuant to section 12-46-11; or
- (2) Where the commission has entered into a conciliation agreement to which the complainant is not a party pursuant to section 12-46-15(d). [Eff 12/31/90; am 11/4/93]
(Auth: HRS §368-3) (Imp: HRS §§368-12, 515-9)

§12-46-21 Record keeping requirements. (a) Any personnel or employment record made or kept by an employer, employment agency, or labor organization shall be preserved by the employer for one year from the date of the making of the record or the personnel action involved, whichever occurs later. The records shall include but not be limited to forms, applications, and records having to do with:

- (1) Hiring;
- (2) Promotion;
- (3) Demotion;
- (4) Layoff or termination;
- (5) Rates of pay or other terms of compensation;
- (6) Labor organization membership;
- (7) Selection for training or apprenticeship; and
- (8) Employment referrals.

(b) In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for one year from the date of termination.

(c) Where a complaint has been filed or civil action has been brought against a respondent under chapters 489 or 515 or part I of chapter 378, HRS, the respondent shall preserve all records, including any personnel records, relevant to the complaint or action until final disposition of the complaint or action.

(1) "Personnel records relevant to the complaint" include:

- (A) Personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant; and
- (B) Application forms or test papers completed by the complainant and by all other candidates for the same position as that for which the complainant applied and was rejected.

(2) "Final disposition of the complaint or action" means:

- (A) A conciliation agreement is approved by the commission;
- (B) The date of expiration of the statutory period within which the complainant may bring an action in circuit court; or
- (C) Where civil action is brought against the respondent by the complainant, the date on which the litigation is terminated by entry of a final order and time for filing a notice of appeal has expired. [Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §§368-3, 378-6)

§12-46-22 Representation by counsel. A party, at the party's own expense, may be represented by counsel, who may be an attorney, at any stage of the proceeding before the hearings examiner or commission. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-9, 368-3)

§12-46-23 Individual representing party. When an individual, acting in a representative capacity on behalf of a party, appears in a proceeding or signs a document submitted to the commission or hearings examiner, that personal appearance or signature shall constitute a representation that the individual is lawfully authorized and qualified to so act. The individual at any time, however, may be required by the commission or hearings examiner to furnish proof of authorization and qualification to act in that capacity. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-24 Substitution of parties. Upon motion and for good cause shown, substitution of parties may be ordered provided that the substitution shall:

- (1) Be conducive to effectuating the ends of justice;
- (2) Not unduly delay the proceeding; and
- (3) Not otherwise unduly harass, hinder, or prejudice the rights of any party.

Except that in the case of the death or legal incapacity of any party, substitution may be ordered without the necessity of filing a motion therefor. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-25 Intervention. Upon timely motion and at the discretion of the hearings examiner, the commission's executive director or any person may be permitted to intervene and be admitted as a party in a proceeding before the hearings examiner if the commission or that person has a substantial interest in the outcome of the proceeding and which interest is not protected by the interests of any of the parties, or the intervention shall be conducive to effectuating the ends of justice and to achieving the goals and purposes of the commission; provided that no intervention shall be permitted if the intervention shall unduly delay the proceeding or harass, hinder, or prejudice the rights of any party to the proceeding. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-26 Consolidation. The hearings examiner, with the approval of the commission, or upon any party's motion timely made and for good cause shown, may consolidate two or more proceedings which involve substantially the same issues, arise out of the same general transaction, or involve the same person or persons, provided the consolidation shall be conducive to the ends of justice and shall not unduly delay the proceedings or hinder, harass, or prejudice any party. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-27 Format and certification of pleadings. (a) Petitions, motions, and other pleadings shall be typed in twelve point pica or equivalent type size upon good quality paper, 8-1\2 x 11 inches in size and of at least sixteen weight, except that documentary exhibits may be larger, if filed to the size of the pleadings to which they are attached.

(b) All copies shall be legible on paper 8-1\2 x 11 inches in size and of at least sixteen weight. No "wet" type copies shall be accepted.

(c) The first page of every pleading shall set forth the name, address, and phone number of the party, the party's attorney, if any, the title of the particular pleading, the docket number, and the name of the proceeding.

(d) All pleadings shall be signed in black ink by the party filing the pleadings or by the party's authorized agent. The signature shall constitute certification that the person so signing has read the pleading and that to the best of the person's knowledge, information, and belief, the pleading is true or has good grounds to support it and is not submitted for the purpose of hindering, harassing, or delaying any party or proceeding.

(e) Unless otherwise provided, all pleadings, motions, memoranda, and other documents shall be filed with the commission hearings examiner. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-28 Service, generally. Unless otherwise provided by this chapter or by other applicable law, whenever service is required to be made on any party to a proceeding before the commission, the service shall be made personally or by first class mail, the document to be served at the party's last known address or to the party's attorney of record or to any other individual representing the party in the proceeding. If personal service or service by mail is unsuccessful the commission or hearings examiner may authorize service by publication if permitted by statute. The commission or hearings examiner may require that personal service be attempted

prior to permitting service by publication. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-29 Service by whom. (a) Unless otherwise provided by this chapter, a party filing a pleading, motion, memorandum, document, or other paper shall cause a copy of the pleading, motion, memorandum, document, or other paper to be served upon each of the other parties to the proceeding, or upon any agent or attorney representing the other party. The party shall file a certificate of service.

(b) Unless otherwise provided by this chapter, the commission shall cause to be served all notices, documents, orders, and other papers issued by it or its hearings examiner. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-30 Extensions of time. Unless otherwise provided, the hearings examiner may extend, by not more than ninety days, or as may be extended by the commission for good cause, the time within which any action shall be taken at the request of any party. The hearings examiner may require that the extension be stipulated to by all parties to the proceeding or that the request be by motion for good cause shown as to why the extension should be granted. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-31 Motions. (a) An application for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

(b) Motions referring to facts not of record shall be supported by affidavits and, if involving a question of law, shall be accompanied by a memorandum in support.

(c) If a hearing is held on the motion, the hearings examiner shall provide notice to be served upon all parties not later than seven days before the hearing and the opposing party shall file and serve any counter affidavits and memorandum in opposition not less than two days before the hearing.

(d) All motions shall be filed with and decided by the hearings examiner.

(e) Failure to comply with the requirements of this section may be the basis for denial of any motion.

(f) The decision on the motion may be made orally at the time of the hearing on the motion, or in writing, or as part of the hearings examiner's decision. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-32 Powers of the hearings examiner in conducting hearing. The hearings examiner shall have in addition to powers as are conferred by law, the powers, in conducting a hearing, without limitation:

- (1) To hold hearings and issue notices;
- (2) To administer oaths and affirmations;
- (3) To consolidate hearings or sever proceedings, provided that those actions shall be conducive to the ends of justice and shall not unduly delay the proceedings or hinder, harass, or prejudice any party;
- (4) To allow and supervise discovery as deemed reasonable and necessary;
- (5) To subpoena and examine witnesses;
- (6) To issue subpoenas;
- (7) To rule upon offers of proof, to receive relevant evidence, and to exclude evidence which is irrelevant, immaterial, repetitious, cumulative, or merely scandalous, and accordingly may restrict lines of questioning or testimony;
- (8) To regulate the course and conduct of the hearing;
- (9) To regulate the manner of any examination so as to prevent the needless and unreasonable harassment, intimidation, or embarrassment of any witness or party at the hearing;
- (10) To remove disruptive individuals, including any party, legal counsel, witness, or observer;
- (11) To hold conferences, including prehearing conferences, before or during the hearing for the settlement or simplification of issues;
- (12) To rule on motions and to dispose of procedural matters;
- (13) To certify any question to the commission for its consideration and disposition;
- (14) To submit in writing any decision together with the findings of fact and conclusions of law and a proposed order to the commission for its consideration and final disposition;
- (15) To dispose of any other matter that normally and properly arises in the course of the proceedings and to take any action authorized by this chapter, chapter 91, HRS, or any other related laws. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-16, 368-3)

§12-46-33 Subpoenas. (a) The hearings examiner, at the request of a party, shall have the power to issue subpoenas requiring the attendance of witnesses or the production of documents prior to or at the hearing. The hearings examiner may require that any

request for the issuance of a subpoena identify with particularity, the person to be subpoenaed or the documents desired. Witnesses summoned shall be paid the same fees and mileage as are paid witnesses in courts in the State and the fees and mileage shall be paid by the party or commission at whose instance the subpoena issues.

(b) Upon motion timely made, or without suggestion, the hearings examiner may:

- (1) Quash or modify the subpoena if it is unreasonable and oppressive; or
- (2) Condition denial of the motion upon advancement by the requesting party of the costs of producing the documents. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-16, 368-3)

§12-46-34 Absence of hearings examiner. When a complaint has been assigned to a hearings examiner for hearing, the powers and duties to be performed by the hearings examiner in connection with the proceeding, without abatement of the proceeding, may be assigned to another hearings examiner, provided no hearings examiner shall render a written decision to the commission unless that hearings examiner was present at all arguments and the presentations of evidence concerning those matters. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-35 Disqualification of hearings examiner or commissioner. (a) No matter shall be heard by a hearings examiner or commissioner who:

- (1) Has any pecuniary interest in the matter being heard;
- (2) Is related within the third degree by blood or marriage to any party to the proceeding;
- (3) Has initiated the complaint of the proceeding, has participated in the investigation preceding the institution of the proceeding or has participated in the development of the evidence to be introduced in the proceeding;
- (4) Has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; or
- (5) Has served as a lawyer in the matter in controversy, or a lawyer with whom the hearing's examiner or commissioner previously practiced law, served during such association as a lawyer concerning the matter, or such lawyer, hearings examiner, or commissioner has been a material

witness concerning it.

(b) A hearings examiner or commissioner may be disqualified from hearing a matter sua sponte, or upon motion of any party. Any motion to disqualify a hearings examiner or commissioner shall be filed and decided prior to the evidentiary portion of the hearing. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-36 Evidence at hearing. (a) The admissibility of evidence at the hearing shall not be governed by the laws of evidence, and all relevant oral or documentary evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Irrelevant, immaterial, or unduly repetitious material shall not be admitted into evidence. The hearings examiner shall give effect to the privileges recognized at law. Documentary evidence may be received in the form of copies, provided that, upon request, all other parties to the proceeding shall be given an opportunity to compare the copy with the original. If the original is not available, a copy may still be admissible, but the nonavailability of the original and the reasons therefor shall be considered by the hearings examiner when considering the weight of the documentary evidence. The hearings examiner may take notice of judicially recognizable facts and of generally recognized technical or scientific facts. The parties, whenever possible, shall be notified before the hearing of the material to be so noticed and shall be afforded an opportunity at the hearing to contest the facts so noticed.

(b) Except as otherwise provided by law, the burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-10, 368-3)

§12-46-37 Decision, generally. (a) Unless otherwise provided, every decision and order issued by the commission or hearings examiner shall be in writing or stated in the record. A hearings examiner's decision shall be accompanied by separate findings of fact and conclusions of law.

(b) The commission shall cause a certified copy of the decision and order together with the findings of fact and conclusions of law to be transmitted by hand or by certified or registered mail, return receipt requested, to each party within a reasonable time.

(c) Where notice of the hearing has been served by publication and the party so served has failed to appear at the hearing, service of the commission's decision is complete upon transmission by

registered or certified mail, return receipt requested, to the party at the party's last known address.

[Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-12, 368-3)

§12-46-38 Motion for reconsideration. Any party within ten days after receipt of any final order may move the commission to reconsider its final order or decision. The motion shall be filed with the commission and shall state specifically what points of law or fact the hearings examiner or commission has overlooked or misunderstood , or any newly discovered evidence, together with brief arguments on the points raised. No answer or reply to the motion shall be considered unless requested by the commission. Oral argument on the motion shall be with the discretion of the commission. Only one motion for reconsideration may be filed by each party and the filing of the motion shall not operate as a stay of the commission's final order or decision. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-39 Judicial review. (a) Any party aggrieved by a final decision or order of the commission or by a preliminary ruling or order of the commission of such a nature that deferral of review pending the entry of a subsequent final order would deprive that party of adequate relief is entitled to judicial review in conformance with sections 91-14 and 368-16, HRS.

(b) Any party requesting judicial review in writing, including any cross appeal, shall notify the hearings examiner or commission and all other parties to the proceeding of the request within the time permitted for requesting judicial review.

[Eff 12/31/90] (Auth: HRS §§91-2, 368-3, 368-16) (Imp: HRS §§91-14, 368-3, 368-16)

§12-46-40 Ex parte communications. (a) Because of the commission's role as final arbiter and because the commission will not be involved in pre-hearing stages, in any proceedings before a hearings examiner or the commission:

- (1) Neither the commission's staff nor any person, either in private or public life, shall communicate privately on the merits of the case with any member of the commission or with the hearings examiner designated to hear and decide the matter unless specifically provided for by law; and
- (2) No member of the commission's staff or any other government agency who participates in the hearing as a witness or counsel shall privately communicate on the merits of the case with any member of the commission or

with the hearings examiner designated to hear and decide the matter, unless specifically provided for by law.

(b) It shall be improper for the commission's staff or any person interested in a proceeding to seek to influence the judgment of the commission or hearings examiner.

(c) It shall be improper for the commission's staff:

(1) To disclose or reveal to any member of the commission or hearings examiner designated to hear and decide the matter the contents of any investigatory report, prepared by the commission, concerning the matter before the commission or hearings examiner; or

(2) To furnish the report or a copy thereof to any member of the commission or hearings examiner designated to hear and decide the matter.

(d) Nothing in this section, which is intended to prohibit the ex parte disclosure of the investigatory report, shall prohibit the introduction of the report at the hearing pursuant to and in conformance with sections 12-46-41 and 12-46-44.

(e) Nothing in this section shall prohibit commission from retaining legal counsel not involved in the prosecution of complaints or representation of complainants before the commission. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-9, 91-2, 368-3)

§12-46-41 Disclosure. (a) A copy of the investigation report, in order to be admitted at hearing, shall be provided to respondent not later than seven days prior to the hearing. If a copy of the investigation report is not provided to respondent, the report shall not be permitted to be introduced at the hearing.

(b) Any party, by timely written demand filed with the hearings examiner, and served upon any other party, may request of another party to the proceeding, the full disclosure of:

- (1) The identity of all witnesses to be called by the party, including their addresses and phone numbers, if known;
- (2) The identity of all persons, including their addresses and phone numbers, known by the party to have material knowledge relevant to the proceeding; and
- (3) All documents to be introduced at the hearing. The requesting party shall have the right to examine the documents and make copies thereof.

(c) All demands for disclosure are standing demands and the party to whom the demand is directed shall be under a duty to disclose the information requested as and when it becomes available.

(d) The information requested shall be disclosed to the requesting party at least seven days prior to the hearing. The

failure to comply with disclosure requirements may result in the evidence subject to the disclosure request not being permitted to be introduced at the hearing. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-42 Prehearing conference. Before the hearing the hearings examiner shall order that a prehearing conference be conducted and attended by all parties to the proceeding, the purpose of which shall be to explore the possibilities of informal satisfaction of the complaint and the simplification of issues. At the prehearing conference the hearings examiner may require all parties to disclose to the other parties the identity of all witnesses to be called, together with their addresses and phone numbers if known, and the documents to be introduced. The hearings examiner may set the time, date, and place of the hearing at the prehearing conference. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-43 Testimony at hearing. (a) Testimony adduced at the hearing may be electronically recorded and need not be transcribed. Unless otherwise provided, the cost of the transcription of the electronic recording of the testimony shall be paid by the requesting party.

(b) Any party may request that all of the testimony adduced at the hearing be taken by a court reporter. The request shall be made prior to the date of the hearing and shall be within the sole discretion of the hearings examiner to grant or deny. The transcript of the proceeding shall constitute the official record of the testimony adduced at the hearing, and shall remain in the possession of the hearings examiner or commission. The cost of the transcript shall be paid for by the requesting party. If a party desires a copy of the transcript for the party's personal use, the requesting party shall pay the cost of a copy of that transcript.

(c) The hearings examiner shall make the electronic recording of the testimony available to the parties for use in preparing exceptions to a proposed decision or recommended decision.

(d) If judicial review is requested, the commission shall cause a transcript of the hearing to be prepared if requested as part of the record on appeal. If a party desires a copy of the transcript for their personal use, the requesting party shall pay the cost of a copy of that transcript.

(e) Unless the commission has been notified in writing of a party's request for judicial review within the time permitted for requesting the review, the commission, after the time for requesting judicial review has passed, may destroy the electronically recorded

testimony. A transcript need not be prepared unless expressly requested and paid for by the requesting party. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-44 Record of hearing. (a) The record shall consist of the following:

- (1) All pleadings, motions, memoranda and intermediate rulings;
- (2) All evidence received or considered, including without limitation, oral testimony, exhibits, and matters officially noted by the commission or hearings examiner;
- (3) All offers of proof and rulings thereon;
- (4) All proposed findings and exceptions;
- (5) The proposed decision of the hearings examiner who presided at the hearing; and
- (6) The investigatory report shall not be made part of the record or disclosed to the hearings examiner unless the report has been provided to the respondent and introduced at the hearing pursuant to section 12-46-41.

(b) Unless the commission has been notified in writing of a party's request for judicial review within the time permitted for requesting judicial review, the commission, after the time for requesting judicial review has passed, may cause exhibits to be returned to the party introducing the exhibits or if the party does not wish their return, order the disposal or destruction of the exhibits. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 91-9, 368-3)

§12-46-45 Notice of hearing. Unless otherwise provided by statute or the parties, all parties shall be given written notice of the hearing at least fifteen days before the hearing. The notice shall include:

- (1) The date, time, place, and nature of hearing;
- (2) The legal authority under which the hearing is to be held;
- (3) The particular sections of HRS and rules involved; and
- (4) A short and concise statement of the issues involved and the facts giving rise to the petition. Attachment of a copy of the complaint to the hearing notice satisfies this requirement.

The notice shall further apprise each party of the party's right to retain legal counsel if so desired. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-9, 91-9.5, 368-3)

§12-46-46 Hearings. All hearings shall be conducted pursuant to chapter 91, HRS, and this chapter. A hearing shall take place no

later than one hundred eighty days after the appointment of the hearings examiner except as may be extended by the commission for good cause. All hearings shall be heard before a duly designated hearings examiner. All parties shall be afforded full opportunity to present evidence and argument on all issues involved. The hearing shall be at the time and place set forth in the notice of hearing, but at that time and place may be continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof at the hearing. The hearings examiner, if there is no dispute as to the facts involved in a particular matter, may permit the parties to proceed by memoranda of law in lieu of a hearing unless the procedure would unduly burden any party or is otherwise not conducive to the ends of justice. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-9, 92-16, 368-3)

§12-46-47 Procedure at hearing. Unless otherwise stipulated by the parties, which stipulation is approved by the hearings examiner, all hearings shall proceed as follows:

- (1) The parties shall have the opportunity to make opening statements before any evidence is presented, unless they waive the opportunity. The opening statement shall be heard in the following order:
 - (A) Complainant's opening statement; and
 - (B) Respondent's opening statement, unless respondent chooses to reserve same until after presentation of petitioner's evidence;
- (2) The complainant's evidence shall be presented first, and shall be followed by the presentation of evidence in support of respondent's case;
- (3) After presentation of the evidence in support of their respective cases, the parties shall have the opportunity to introduce rebuttal evidence. Rebuttal evidence shall be introduced in the same order as was followed with respect to the introduction of evidence in support of their respective cases;
- (4) Each witness shall be examined first by the party calling the witness before cross-examination by the opposing party;
- (5) After all evidence, including rebuttal evidence, has been presented, the parties shall have the opportunity to make final argument. Final argument shall proceed as follows:
 - (A) Complainant's final argument;
 - (B) Respondent's final argument; and
 - (C) Complainant's final argument in rebuttal which shall be limited to countering matters raised in

- respondent's final argument; and
- (6) The hearing shall be deemed closed after completion of all final arguments or upon filing of all permitted memoranda and other post hearing submissions or upon the expiration of the time allowed for filing submissions, unless the time is extended, or upon the completion of taking further evidence pursuant to section 12-46-49, whichever is later. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-48 Motion to dismiss. (a) After all evidence has been presented by complainant in support of complaint, the respondent may move for the hearings examiner for an order denying or dismissing the complaint or for similar affirmative relief.

(b) If the motion is denied or taken under advisement, respondent shall have the right to continue with the proceeding as fully as if the motion had never been made. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-49 Taking of further evidence. At any time prior to the filing of the hearings examiner's proposed decision, the hearings examiner may, without suggestion or upon motion for good cause shown, reopen a hearing for the purpose of taking further evidence. The reopening shall be at the sole discretion of the hearings examiner. Further evidence may be taken either through oral hearing or by certification of questions to the parties. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 368-3)

§12-46-50 Proposed findings of fact and conclusions of law. (a) The parties, upon first obtaining the permission of the hearings examiner, may file and serve upon all other parties to the proceeding written proposed findings of fact and conclusions of law together with the reasons therefor, within fifteen days after the close of the hearing, which, wherever possible, shall contain specific references to the record and shall state the authorities relied upon. Proposed findings of fact and conclusions of law that find an unlawful discriminatory practice shall include a proposed remedy.

(b) The grant of permission shall be at the sole discretion of the hearings examiner. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3) (Imp: HRS §§91-2, 91-12, 368-3)

§12-46-51 Proposed decision. The hearings examiner, within sixty days or as may be extended by the commission after the close of the hearing, shall file with the commission a decision together with separate findings of fact, conclusions of law, and shall include a

remedy when there is a finding of an unlawful discriminatory practice. Any order recommended by the hearings examiner shall be based upon the whole record and supported by the reliable probative and substantial evidence, including facts of which the hearings examiner properly took judicial notice. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3, 368-14) (Imp: HRS §§91-11, 91-12, 368-3, 368-14)

§12-46-52 Service of proposed decision. The commission shall cause a copy of the decision, including therein findings of fact, conclusions of law, and any recommended order, to be served upon each party by personal service or by registered or certified mail, return receipt requested. Service of the proposed decision shall be deemed complete upon its mailing to the party's last known address. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3, 368-14) (Imp: HRS §§91-11, 368-3, 368-14)

§12-46-53 Decision, exceptions. Any party adversely affected by the hearings examiner's decision within fifteen days after the receipt of a copy of the decision, may file with the hearings examiner written exceptions to the whole or any part of the decision and request review by the commission. Each written exception shall specify the portions of the record and authorities relied upon to sustain each point. A copy of the written exceptions shall be served by the party so excepting upon each party to the proceeding. Unless the time has been extended, no written exceptions shall be filed or accepted for filing after the time specified, except by leave of the commission for good cause shown. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3, 368-14) (Imp: HRS §§91-11, 368-3, 368-14)

§12-46-54 Statement in support of decision. Any party may file with the hearings examiner and serve upon all other parties a statement in support of the decision within fifteen days after receipt of a copy of the written exceptions. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3, 368-14) (Imp: HRS §§91-11, 368-3, 368-14)

§12-46-55 Transmittal to commission. The hearings examiner shall transmit to the commission the entire record together with the decision, any timely filed exceptions, and any timely filed statement in support. [Eff 12/31/90] (Auth: HRS §§91-2, 368-3, 368-14) (Imp: HRS §§91-11, 368-3, 368-14)

§12-46-56 Argument on written exceptions. Whenever written exceptions have been timely filed and a party has requested the opportunity to present oral argument, all parties to the proceedings shall be afforded the opportunity to present oral argument to the

commission concerning the decision. The commission shall personally consider the whole record or portions of the record as may have been cited by the parties either in support of or in opposition to the decision. All parties shall be served with notice of the time and place of argument at least five days prior to the time for argument. The commission shall issue a written final decision and order, either adopting, modifying, or reversing, in whole or in part, the hearings examiner's decision in complaints alleging violations of chapters 368, 378, or 489, HRS, within a reasonable time after argument has been heard. The commission shall issue a written final decision and order in complaints alleging violations of chapter 515, HRS, within one year of the date of the filing of the complaint, unless the commission finds it impracticable to do so. In complaints alleging violations of chapter 515, HRS, complainants and respondents shall be provided with written notice if the commission cannot issue a written final decision and order within one year of the date of the filing of the complaint. [Eff 12/31/90; am 11/4/93] (Auth: HRS §§91-2, 368-3, 368-14) (Imp: HRS §§91-11, 368-3, 368-14, 515-9)

§12-46-57 No written exceptions. When no written exceptions have been filed, the commission, in complaints alleging violations of chapters 368, 378, or 489, HRS, shall issue a written final decision and order, either adopting or modifying or reversing, in whole or in part, the hearings examiner's decision, within a reasonable time after the hearings examiner's decision has been filed. The commission shall issue a written final decision and order in complaints alleging violations of chapter 515, HRS, within one year of the date of the filing of the complaint, unless the commission finds it impracticable to do so. In complaints alleging violations of chapter 515, HRS, complainants and respondents shall be provided written notice if the commission cannot issue a written final decision and order within one year of the date of the filing of the complaint. The commission shall state with specificity in the final decision the reasons for any modification or reversal, in whole or in part, of the hearings examiner's decision. [Eff 12/31/90; am 11/4/93] (Auth: HRS §§91-2, 368-3, 368-14) (Imp: HRS §§91-11, 368-3, 368-14, 515-9)

§12-46-58 Savings clause. If any provision of these rules, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of these rules which can be given effect without the invalid provision or application, and to this end the provisions of these rules are severable. [Eff 12/31/90] (Auth: HRS §368-3) (Imp: HRS §358-3)

SUBCHAPTER 2

DECLARATORY RELIEF

§12-46-61 Contents of petition for declaratory relief. The commission's executive director or any interested person may petition the commission for a declaratory ruling as to the applicability of any HRS provision or of any rule adopted by the commission to a factual situation. Each petition shall state concisely and with particularity the facts giving rise to the petition, including the petitioner's interest, reasons for filing the petition, and the names of any potential respondents, the provision or rule in question, the issues raised, and petitioner's position or contentions with respect thereto. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

§12-46-62 Memorandum of authorities in support of petition. Petitioner shall also file, together with any petition for declaratory relief and at the time the petition is filed, a memorandum of authorities in support of the petition which shall contain a full discussion of the reasons, including legal authorities, supportive of the petitioner's position. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

§12-46-63 Disposition of petition. (a) The commission, as expeditiously as possible after the filing of a petition for declaratory relief, may refuse to consider any petition for declaratory relief. Without limiting the generality of the foregoing, the commission may refuse consideration where:

- (1) The petition fails to substantively conform with section 12-46-61 or is not supported by a memorandum of authorities in support of the petition;
- (2) The petition is frivolous;
- (3) The matter is not within the jurisdiction of the commission;
- (4) The petition is based on hypothetical or speculative facts of either liability or damages; or
- (5) There is a genuine controversy of material fact, the resolution of which is necessary before any order or declaratory relief may issue.
- (6) There is any other reason justifying denial of the petition.

(b) With respect to each petition to be considered, and as expeditiously as possible, the commission shall:

- (1) Summarily, and in writing, deny the petition, setting

forth the reasons for the denial and advise petitioner of the right to request reconsideration or judicial relief or grant the relief sought either as prayed for or as modified by the commission, setting forth the reasons therefor and advise respondent, if any, of the right to request reconsideration or judicial relief;

- (2) Set the petition for argument before the commission in accordance with this subchapter; or
- (3) At its sole discretion, assign the petition to the hearings examiner for further proceedings in accordance with this subchapter. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

§12-46-64 Parties. Unless a petition has been summarily disposed of pursuant to section 12-46-63, in all petitions for declaratory relief where the commission's executive director is not the petitioner, the executive director shall be made a party respondent to the proceedings and shall be served accordingly. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

§12-46-65 Memorandum in opposition. Each respondent, within fifteen days after the receipt of the petition, may file and serve upon the petitioner a memorandum in opposition stating concisely and fully the respondent's position or contentions and reasons, including legal authorities. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

§12-46-66 Intervention and intervenor's memorandum of authorities. Unless the petition has been summarily disposed of pursuant to section 12-46-65 and subject to section 12-46-25, any interested person may request intervention in a proceeding for declaratory relief. Any person permitted to intervene in a proceeding for declaratory relief may file and serve upon petitioner, a memorandum of authorities which shall state concisely and fully the intervenor's position or contentions and reasons, including legal authorities.

The commission's executive director shall be deemed a party without the necessity of formal intervention.
[Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

§12-46-67 Request for additional facts or supplemental memorandum. The commission or the hearings examiner at any time may request of the petitioner or any party, a statement of additional facts or a memorandum, the purpose of which is to clarify a specific

factual issue, position, contention, or issue provided the request shall aid the commission in effectuating the ends of justice, or in achieving its purposes, and shall not unduly delay the proceedings or hinder, harass, or unreasonably prejudice any part. [Eff 12/31/90] (Auth: HRS §§91-8, 26-9) (Imp: HRS §§91-8, 26-9)

§12-46-68 Notice of argument. All parties shall be given written notice of the hearing of argument at least fifteen days before the time of the argument. The notice shall include:

- (1) The date, time, place, and nature of the argument;
- (2) The legal authority under which the argument is to be heard;
- (3) Particular sections of the statutes and rules involved; and
- (4) A short and concise statement of issues involved, the basic facts giving rise to the petition.

The notice shall further apprise each party of their right to retain legal counsel if so desired. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 91-9, 91-9.5, 368-3)

§12-46-69 Argument. Argument shall be heard either before the commission or a hearings examiner duly designated. All parties shall be afforded full opportunity to present argument on all issues involved. The argument shall be at the time and place set forth in the notice of argument but at that time and place may be continued from day to day and adjourned to a later day or to a different place without notice other than the announcement thereof at the hearing. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 91-9, 368-3)

§12-46-70 Material issue of fact, public interest. If, at any time, it appears that there exists a genuine controversy of material fact the resolution of which is necessary before any order of declaratory relief may issue, or that the petition raises issues of public concern and interest that a proceeding for rule relief would more fairly and effectively aid the commission in achieving its purposes and goals and protect that public concern or interest, the commission or hearings examiner may:

- (1) Without suggestion or on motion of any party dismiss the petition for declaratory relief and allow same to be refiled as a complaint or petition for hearing or rule relief;
- (2) Convert the proceeding to one of hearing or rule relief and proceed thereafter as if the complaint or petition had been brought originally for hearing or rule relief. If

the proceeding is converted to a proceeding for hearing relief, the issues may be restricted to those material facts in issue. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

§12-46-71 Proposed findings of fact and conclusions of law.

(a) The parties, upon first obtaining the permission of the commission or hearings examiner, may file and serve upon all other parties to the proceeding, written proposed findings of fact and conclusions of law together with the reasons therefor within fifteen days after the close of the argument or submission of requested or permitted memoranda, whichever is later. The submission, wherever possible, shall contain specific references to the record and shall state the authorities relied upon.

(b) Any grant of permission shall be at the sole discretion of the commission or hearings examiner. When the argument has been conducted by a hearings examiner, the parties shall not, under any circumstances, file proposed findings of fact and conclusions of law with the commission. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 91-12, 368-3)

§12-46-72 Commission's decision. (a) When the argument has been held before the commission, the commission, as expeditiously as possible after the close of the argument or submission of all permitted or requested memoranda, whichever is later, shall issue its final decision and order.

(b) When the petition has been contested, and the commission's decision and order is adverse to any party, the commission shall also issue and serve upon each party to the proceeding, together with its final decision and order, separate findings of fact and conclusions of law.

(c) All final decisions and orders and any findings of fact and conclusions of law issued by the commission shall be based upon the whole record and supported by reliable probative and substantial evidence, including those facts on which the commission properly took judicial notice. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 91-12, 368-3)

§12-46-73 Hearing Examiner's Decision. (a) When the argument has been held before a hearings examiner, the hearings examiner, as expeditiously as possible after the close of the argument or submission of all requested or permitted memoranda, whichever is later, shall file with the commission the hearings examiner's decision and any proposed order.

(b) When the petition has been contested and the decision and

order is adverse to any party, the hearings examiner shall file with the decision and order separate findings of fact and conclusions of law.

(c) The decision, findings of fact, conclusions of law, and any order proposed by the hearings examiner shall be based upon the whole record and supported by the reliable, probative, and substantial evidence, including those facts of which the hearings examiner properly took official notice.

(d) The hearings examiner shall serve a copy of the decision and any proposed order, together with any findings of fact and conclusions of law upon each party by personal service or by registered or certified mail, return receipt requested. Where notice of the argument has been served by publication and the party so served has failed to appear at the argument, service of the decision is complete upon its mailing to the party at the party's last known address. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 91-11, 368-3)

§12-46-74 Commission's action on proposed decisions.(a) Where the petition has been contested, any party adversely affected by the hearings examiner's decision within fifteen days after the receipt of a copy of the decision, may file with the commission written exceptions to the whole or any part of the decision and request review by the commission. Each written exception shall specify the portions of the record and authorities relied upon to sustain each point. A copy of the written exceptions shall be served by the party so excepting upon each party to the proceeding, and upon the hearings examiner. Unless the time has been extended, no written exceptions shall be filed or accepted for filing after the time specified, except by leave of the commission for good cause shown.

(b) Where the petition has been contested and written exceptions filed, any party may file and serve upon all other parties and the hearings examiner a statement in support of the decision within fifteen days after receipt of a copy of the written exceptions.

(c) Where the petition has been contested and whenever written exceptions have been timely filed, all parties to the proceedings shall be afforded the opportunity to present oral argument to the commission concerning the proposed decision. The commission shall personally consider the whole record or portions of the record as may have been cited by the parties either in support or in opposition to the decision. All parties shall be served with notice of the time and place of argument at least five days prior to the time for argument. Within a reasonable time after argument has been heard, the commission shall issue a final decision and order, either

affirming, modifying, or reversing, in whole or in part, the hearing examiner's decision.

(d) Where the petition has not been contested, or if no written exceptions have been filed, the commission, within a reasonable time after the hearings examiner's decision has been filed, shall issue a written final decision and order, either adopting modifying, or reversing, in whole or in part, the hearings examiner's proposed decision. The commission shall state with specificity in the final decision the reasons for any modification or reversal, in whole or in part, of the hearings examiner's proposed decision. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 91-11, 91-12, 368-3)

§12-46-75 Order, effect. Any decision and order of declaratory relief, whether granting or denying the petition, shall have the same force and effect as other decisions and orders issued by the commission. [Eff 12/31/90] (Auth: HRS §§91-8, 368-3) (Imp: HRS §§91-8, 368-3)

SUBCHAPTER 3

RULE RELIEF

§12-46-81 Contents of petition for rule relief. The commission's executive director or any interested person may petition the commission for the amendment, adoption, or repeal of a rule. The petition for rule relief shall set forth the test of the rule to be repealed, or the test of any proposed rule, the adoption of which is being sought, or the test of any existing rule, the amendment of which is being sought, together with the proposed amendment. The petition shall further state concisely and with particularity the facts and circumstances giving rise to the petition, including the petitioner's interest and reasons for filing the petition, the necessity for the relief and the anticipated effect or impact of the relief, the questions or issues raised and petitioner's position or contentions with respect thereto. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-6, 368-3)

§12-46-82 Disposition. (a) The commission, within the time permitted by chapter 91, HRS, shall either deny the petition further consideration, or initiate public rulemaking procedures in accordance with this subchapter and chapter 91, HRS.

(b) Without limiting the generality of the foregoing, the commission may deny any petition which:

- (1) Fails to substantially conform with the requirements of section 12-46-81;
- (2) Discloses no sufficient reasons justifying the institution of public rulemaking procedures; or
- (3) Is frivolous. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-6, 368-3)

§12-46-83 Notice of determination. The commission shall promptly notify the petitioner in writing of a determination not to consider the petition and shall further state the reasons therefor. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-6, 368-3)

§12-46-84 Determination final. Unless otherwise provided by law, the petitioner shall have no right to move the commission for reconsideration or to seek judicial review of any determination. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-6, 368-3)

§12-46-85 Additional facts or supplemental memorandum. The commission may require the petitioner or any person or the commission's executive director to submit a statement of additional facts or a memorandum, the purpose of which is to clarify a specific factual issue, position, or contention which will reasonably aid the commission. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-6, 368-3)

§12-46-86 Public hearing. Subject to sections 91-4 and 91-17, HRS, a public hearing shall be held for a petition for rule relief considered by the commission. Notice of the public hearing shall be given at least thirty days before the public hearing is held. The hearing shall be at the time and place set forth in the notice of public hearing but at that time and place may be continued from day to day or adjourned to a later day or to a different place without notice other than the announcement thereof at the hearing. The commission shall afford, the commission's chief attorney and all interested persons an opportunity to present data, their views or arguments, orally or in writing. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-3, 368-3)

§12-46-87 Notice of public hearing. (a) The commission shall publish notice of the public hearing in a newspaper of general circulation throughout the State, and which is printed and issued at least twice weekly. The notice shall be published once in two consecutive weeks, and the last published notice shall appear at least thirty days prior to the hearing.

(b) The commission shall further transmit, by first class

mail, the notice to all interested persons who have timely requested in writing the notice.

(c) The notice shall state the time, date, and place for the public hearing and shall contain the substance of the proposed rule change to be considered at the public hearing. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-3, 92-41, 368-3)

§12-46-88 Procedure at public hearing. At the commencement of the public hearing the member of the commission presiding at the public hearing shall read the notice of hearing and shall then briefly prescribe the procedure to be followed at the public hearing. All witnesses testifying at the public hearing shall state their name, address, and who, if anyone, the witness represents, and other information as the presiding member of the commission may request. Every witness shall be subject to questioning by members of the commission or by any other representative of the commission. Questioning of the witnesses by other persons shall not be permitted except when the presiding member of the commission expressly permits that questions.

[Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-3, 368-3)

§12-46-89 Transcript of the testimony. Testimony given at the public hearing shall not be recorded verbatim unless the commission at its sole discretion, either without suggestion or upon the request of any interested party, orders otherwise. All written documents shall be received and made part of the public record at the discretion of the commission.

[Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-6, 368-3)

§12-46-90 Decision. (a) The commission shall render its decision at the public hearing or at a time, date, and place as is announced at the public hearing. The commission, upon the request of any interested person, shall issue a concise statement of the principle reasons for and against its decision. In making its decision, the commission shall consider all written and oral submissions respecting the proposed rule relief. Unless otherwise provided by law, the requirements of section 12-46-37 shall not apply to a decision rendered pursuant to this section.

(b) Unless otherwise provided by law, any decision rendered pursuant to this section shall not be subject to a motion for reconsideration or judicial review. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-3, 368-3)

§12-46-91 No restriction on commission. Nothing contained in this subchapter shall be construed to prohibit or restrict the right

of the commission from initiating its own rulemaking proceeding on any matter, whether disclosed in any petition or not. [Eff 12/31/90] (Auth: HRS §§91-6, 368-3) (Imp: HRS §§91-3, 368-3)

SUBCHAPTER 4

SEX DISCRIMINATION

§12-46-101 General provisions. (a) Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment because of sex except where sex is a bona fide occupational qualification (BFOQ). Chapter 378, HRS, and this subchapter apply to males and females alike.

(b) The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to a group. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-8)

§12-46-102 Bona fide occupational qualification (BFOQ). (a) The burden of proving that sex is a bona fide occupational qualification (BFOQ) rests upon the employer or other covered entity seeking the exception.

(b) The BFOQ exception as to sex shall be strictly and narrowly construed. The commission believes that most jobs can be performed equally well by a male or a female, and that individual differences rather than sex differences are the determining factors.

(c) An employer or other covered entity may make an inquiry of the commission as to whether sex is a BFOQ for a particular job. The commission shall give informal opinions in response to such inquiries.

(d) The following situations do not constitute BFOQ exceptions to chapter 378, HRS:

- (1) The refusal to hire or promote a female because of her sex based on assumptions of the comparative employment characteristics of females in general, e.g., the assumption that the absence or turnover rate among females is higher than among males; or
- (2) The refusal to hire or promote an individual based on stereotyped characterizations of the sexes, e.g., that males are less capable of assembling intricate equipment; that females are less capable of being aggressive salespersons; or
- (3) The refusal to hire, refer, recommend, or consider for a position, or promote an individual because of preferences

or sense of propriety of co-workers, the employer, client, or customer; or

- (4) The fact that the employer may have to provide separate facilities because of a person's sex will not justify discrimination under the BFOQ exception unless the expense would clearly be unreasonable.

(e) The following situations are recognized as those in which a distinction based on sex may be a bona fide occupational qualification:

- (1) Where it is necessary for the purpose of authenticity or genuineness, e.g., an actor to play a male role or a female to model feminine apparel; or
- (2) Where public morals demand that one sex be given preference over the other in performing a particular function, e.g., a masseuse to work at a women's health club; a male to work as an attendant in a man's washroom; a female to work as a fitter of feminine apparel.

(f) Employers or other covered entities shall assign job duties and make other reasonable accommodations so as to minimize the number of jobs for which sex is a BFOQ.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-3, 378-8)

§12-46-103 Pre-employment practices. (a) Employers or other covered entities engaged in recruiting activity shall recruit employees of both sexes for all jobs. Employers or other covered entities placing advertisements indicating any sex preference, limitation, specification, or discrimination are in violation of chapter 378, HRS, unless sex is a BFOQ for the particular position involved.

(b) It shall be unlawful for any publication or other media to separate listings of job openings into "male" and "female" classifications or use job titles which specify one sex.

(c) A pre-employment inquiry shall not ask "male---, female---" or "Mr., Mrs., Miss, Ms." unless the inquiry is a BFOQ. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-104 Employee selection. (a) Tests of physical agility or strength shall not be used unless the test is administered pursuant to a BFOQ. No applicant or employee shall be refused the opportunity to demonstrate that he or she has the requisite strength or agility to perform the job in question.

(b) Use of height or weight standards which discriminate against one sex or the other is unlawful unless pursuant to a BFOQ. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-105 Terms, conditions, and privileges of employment.

(a) Wages shall not be related to or based on the sex of the employees.

(b) The employer shall not restrict one sex to certain job classifications. The employer shall make jobs available to all qualified employees in all classifications without regard to sex.

(c) Employees of both sexes shall be treated equally in regard to all training programs, opportunities for promotions, and fringe benefits. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-106 Pregnancy, childbirth, and related medical conditions; general policy. Females shall not be penalized in their terms or conditions of employment because they require time away from work on account of disability resulting from pregnancy, childbirth, or related medical conditions.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-8)

§12-46-107 Hiring, retention, and accommodation of pregnant females. (a) An employer shall not exclude from employment a pregnant female applicant because of her pregnancy.

(b) It is an unlawful discriminatory practice to discharge a female from employment or to penalize her in terms, conditions, and privileges of employment because she requires time away from work for disability due to and resulting from pregnancy, childbirth, or related medical conditions.

(c) An employer shall make every reasonable accommodation to the needs of the female affected by disability due to and resulting from pregnancy, childbirth, or related medical conditions. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-1, 378-2)

§12-46-108 Leave due to pregnancy, childbirth, or related medical conditions. (a) Disability due to and resulting from pregnancy, childbirth, or related medical conditions shall be considered by the employer to be justification for a leave, with or without pay, by the female employee for a reasonable period time. "Reasonable period of time" as used in this section shall be determined by the employee's physician, with regard for the employee's physical condition and the job requirements.

(b) The employer may request a doctor's certificate estimating the length of leave and the estimated commencement and termination dates of leave required by the employee.

(c) A female employee shall be reinstated to her original job or to a position of comparable status and pay, without loss of accumulated service credits and privileges. The employer may request, prior to the employee's return, a medical certificate from the employee's physician attesting to her physical condition and approving her return to work.

(d) Chapter 378, HRS, does not require any employer to grant paid or unpaid child care leave of absence. Any employer providing such leaves shall do so without regard to the sex of the employee applying for such leave. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-1, 378-2)

§12-46-109 Sexual harassment. (a) Harassment on the basis of sex is a violation of chapter 378, HRS. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or visual forms of harassment of a sexual nature constitute sexual harassment when:

- (1) Submission to that conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
- (2) Submission to or rejection of that conduct by an individual is used as the basis for employment decisions affecting that individual; or
- (3) That conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) An employer shall be responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or other covered entity knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acted in either a supervisory or agency capacity.

(d) With respect to conduct between employees, an employer shall be responsible for acts of sexual harassment in the workplace

where the employer or its agents or supervisory employees knows or should have known of the conduct and fails to take immediate and appropriate corrective action. An employee who has been sexually harassed on the job by a co-worker should inform the employer, its agent, or supervisory employee of the harassment; however, an employee's failure to give such notice may not be an affirmative defense.

(e) An employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees at the workplace, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of the non-employees.

(f) Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

(g) Prevention is the best tool for the elimination of sexual harassment. Employers should affirmatively raise the subject, express strong disapproval, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-110 Employment agencies. (a) Employment agencies shall not:

- (1) Refer or refuse to refer applicants for jobs upon the basis of the sex of the applicant;
- (2) Maintain separate application forms or separate files for male and female jobs and job candidates;
- (3) Accept or process any job order which contains or expresses directly or indirectly any limitation, specification, preference, or discrimination as to sex, unless based on a BFOQ; and
- (4) Solicit and interview applicants on the basis of sex unless sex is a BFOQ.

(b) Employment agencies which deal exclusively with one sex are engaged in an unlawful discriminatory practice, except to the extent that those agencies limit their services to furnishing employees for particular jobs for which sex is a BFOQ.

(c) An employment agency that receives a job order containing

an unlawful sex specification shall share responsibility with the employer placing the job order if the agency fills the order knowing that sex specification is not a BFOQ. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-111 Labor organizations. (a) Labor organizations shall not utilize information on applications for membership which would signify the sex of an applicant.

(b) It shall be an unlawful discriminatory practice for a labor organization to indicate in any manner that an individual is ineligible for membership because of sex or that there are different standards which are based on sex.

(c) Apprenticeship programs shall be open to both sexes in all jobs for which sex is not a BFOQ.

(d) A labor organization shall represent all members fairly without regard to sex. Female and male members shall be granted the same privileges, powers, rights, duties, and responsibilities.

(e) Labor organizations maintaining union hiring halls shall be bound by the rules applicable to employment agencies in section 12-46-110. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

SUBCHAPTER 5

MARITAL STATUS DISCRIMINATION

§12-46-121 General policy. Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment because of the individual's marital status. Chapter 378, HRS, and policies apply to males and females alike.
[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-8)

§12-46-122 Bona fide occupational qualification (BFOQ). The BFOQ exception as to marital status shall be strictly and narrowly construed. The burden of proving that marital status is a BFOQ rests upon the employer or other covered entity seeking to rely on the exception. The determination of the legality of an alleged BFOQ will be made from an examination of the employer's business requirements and the totality of the circumstances, on a case by case basis. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-3)

§12-46-123 Pre-employment practices and policies. (a) An employer or other covered entity placing a help wanted advertisement indicating any marital status preference, limitation, or specification may request an advisory determination from the commission as to whether it is a violation of the statute. The commission shall give informal opinions in response to such requests.

(b) A pre-employment inquiry or application shall not ask:

- (1) Mr., Mrs., Miss, Ms., or
- (2) Single, married, divorced, widowed, separated, etc.; or
- (3) Name and ages of spouse and children; or
- (4) Spouse's place of employment.

(c) An applicant may be asked whether he or she has used another name in order that the applicant's past work record may be checked. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-124 Employee selection. An employment decision shall not be based on an individual's marital status.
[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-125 Terms, conditions, and privileges of employment. (a) It shall be unlawful for an employer or other covered entity to discriminate on the basis of marital status with regard to wages, job duties, fringe benefits, or other terms, conditions, and privileges of employment.

(b) It is violation of chapter 378, HRS, for an employer to:

- (1) Give different fringe benefits to married employees as opposed to single employees; or
 - (2) Make available fringe benefits for wives of male employees which are not made available to single female employees; or
 - (3) Make available fringe benefits for the husbands of female employees which are not make available to single male employees; or
 - (4) To condition fringe benefits upon whether an employee is "head of household", "principal wage earner", "secondary wage earner", or other similar status.
- (c) Married and single employees shall have equal access to all training programs and opportunities for promotion.
[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§§12-46-127 to 12-46-130 (Reserved)

SUBCHAPTER 6

AGE DISCRIMINATION

§12-46-131 General policy. Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment because of a person's age, except where age is a bona fide occupational qualification (BFOQ). [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2, 378-3)

§12-46-132 Bona fide occupational qualification (BFOQ). (a) Whether occupational qualifications will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business" shall be determined on the basis of all the pertinent facts surrounding each particular situation. This concept of a BFOQ shall have limited scope and application, and shall be narrowly construed.

(b) An employer or other covered entity asserting a BFOQ defense has the burden of proving that:

- (1) The age limit is reasonably necessary to the essence of the business; and either
- (2) All or substantially all individuals excluded from the job involved are in fact disqualified; or
- (3) Some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

If the employer or other covered entity's objective in asserting a BFOQ is the goal of public safety, the employer or covered entity

shall prove that the challenged practice does in fact effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

(c) An age requirement specified by law, rule, or regulation, shall be considered a BFOQ where the requirement is related to the work which the employee must perform. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-3)

§12-46-133 Pre-employment practices. (a) Where an employer or other covered entity, as a part of its recruitment process, advertises job openings through the media, employment agencies, posting of notices, or through other means, it is discrimination on the basis of age for the employer to express or cause to be expressed a preference for individuals of a particular age or range of ages unless there is a BFOQ for the position. Phrases such as "young", "college student", "girl", "boy", "recent college graduate", "retired person", "supplement your pension", or others of a similar nature are prohibited unless there is a BFOQ for the position.

(b) No newspaper or other publication published within the State shall accept, publish, print, or otherwise cause to be advertised any notice of an employment opportunity from an employer or other covered entity containing any indication of a preference, limitation, or specification based on age, unless the newspaper or publication has obtained the approval of the department indicating that the preference, limitation, or specification is a BFOQ.

(c) Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to age shall be unlawful unless based on a BFOQ. An applicant shall not be:

- (1) Asked his or her age or date of birth; or
- (2) Required to produce proof of age in the form of a birth certificate or baptismal record.
- (d) Nothing in subsection (c) shall be construed to prohibit:
 - (1) Any inquiry as to whether or not the applicant meets the minimum age requirement set by statute or rule. If the applicant is under eighteen years of age, the employer may require proof of age in the form of an employment certificate or certificate of age; or
 - (2) An employer, after an applicant has been hired, to inquire as to the applicant's age where those inquiries serve legitimate record-keeping purposes.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-134 Employee selection. (a) It is unlawful for an

employer or other covered entity to discriminate in employment by giving preference because of age. Thus, if two people of different ages apply for the same position, the employer or other covered entity may not lawfully turn down either one on the basis of age but shall make the decision on the basis of some other factor.

(b) Nothing in this section shall be construed to preclude an employer from selecting from among all applicants an individual who is in fact better qualified for a position over one who is less qualified or from hiring an individual on the basis of experience and training superior to other applicants. [Eff 12/31/90] (Auth: HRS §§368-3, 378-3) (Imp: HRS §§368-3, 378-2)

§12-46-135 Physical or medical examination of applicants and employees. It is discrimination on the basis of age for any employer or other covered entity to require an applicant or employee who is within a certain age group to undergo a physical or medical examination to determine whether or not the applicant or employee meets the job-related physical or medical standards when the examinations are not required of all applicants or employees. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-136 Bona fide employee benefit plan. An employer may observe the terms of any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of chapter 378, HRS, in regards to age discrimination. However, no benefit plan shall be used as a reason for not hiring or for terminating any individual on the basis of age. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-8)

§12-46-137 Prohibition of mandatory retirement. (a) Before April 30, 1984, nothing in chapter 378, HRS, was deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan. This authorized involuntary retirement regardless of age provided that the retirement is pursuant to the terms of a bona fide retirement or pension plan. The involuntary retirement provision had to be contained in a bona fide pension or retirement plan and be required by the terms of the plan and not be optional.

(b) Effective April 30, 1984, section 378-3(4), HRS, prohibits mandatory retirement by modifying the exception for bona fide pension and retirement plans. To allow time for the adjustment of existing collective bargaining agreements and other retirement and pension systems, section 378-3(4), HRS, provides a grace period of up to two years ending April 30, 1986, or until the termination of the plan or agreement, whichever occurs first.

(c) It is not the intent of Act 85, SLH 1984, to require other changes in a bargaining agreement or retirement and pension plan. An employer or other covered entity is not required to provide benefits which were not provided prior to the removal of mandatory retirement provisions from an employee retirement or pension plan.

(d) It shall not be unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-3)

§12-46-138 Bona fide seniority systems. (a) It shall not be unlawful for an employer or other covered entity to observe the terms of a bona fide seniority system which is not a subterfuge to evade the purposes of chapter 378, HRS.

(b) A seniority system which gives those with longer service lesser rights and results in discharge or less favored treatment to those in certain age groups, depending upon the circumstances, may be a "subterfuge to evade the purposes" of chapter 378, HRS.

(c) Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system shall be based upon length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

(d) Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be considered a bona fide seniority system within the meaning of chapter 378, HRS. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-139 Reduction in force. Any reduction in work force that causes a wholesale discharge of older workers for no apparent rational reason other than age is a violation of chapter 378, HRS. An employer may not justify such a reduction on the basis that older employees are paid more than younger employees. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

SUBCHAPTER 7

RELIGIOUS DISCRIMINATION

§12-46-151 General policies. Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment because of a person's religion. This subchapter serves as a standard

for determining whether employment policies concerning an employee's religious belief conform with the basic purposes of chapter 378, HRS. The commission shall review each case on an individual basis in an effort to seek an equitable application of this subchapter to the variety of situations which arise due to the varied religious practices of the people of this State. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§378-3, 378-8)

§12-46-152 Pre-employment practices. (a) It is a violation of chapter 378, HRS, for an employer or other covered entity to:

- (1) Ask about an applicant's religious affiliation;
- (2) Ask if an applicant attends religious services or a house of worship; or
- (3) Ask an applicant any questions that might indicate or identify that person's religious denomination or practices.

(b) An employer shall justify by business necessity, inquiries concerning availability. Employers who have a legitimate interest in knowing the availability of their applicants prior to selection, shall consider procedures which would serve this interest without excluding persons whose religious practices need accommodation. For example, an employer may ask: "Apart from absences for religious observances, will you be available for work at the following times?" After a position is offered, the employer may inquire into the need for a religious accommodation, if any, and determine whether an accommodation is possible in accordance with this subchapter.

(c) When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the employer or other covered entity shall accommodate the employee or prospective employee unless undue hardship would result.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-153 Employee selection. (a) An employer shall not permit an applicant's religion or the need for religious accommodation to affect in any way its decision to hire the applicant, unless the employer can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(b) It shall be prima facie evidence that the need for religious accommodation influenced a decision to reject an applicant when:

- (1) Prior to selection, the employer elicits information which would determine an applicant's need for a religious accommodation;

- (2) This procedure is not justified by business necessity; and
- (3) The employer rejects a qualified applicant after the employer has determined the applicant's need for accommodation.

The burden is then on the employer to demonstrate that factors other than need for an accommodation were the reasons for rejecting the qualified applicant, or that reasonable accommodation without undue hardship was not possible. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-154 Reasonable accommodation. (a) After an employee or prospective employee notifies the employer or other covered entity of his or her need for a religious accommodation, the employer or other covered entity shall reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or other covered entity can demonstrate that an undue hardship would result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(b) When there is more than one method of accommodation available which would not cause undue hardship, the commission will determine whether the accommodation offered is reasonable by examining:

- (1) The alternatives for accommodation considered by the employer or other covered entity; and
- (2) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. [Eff 12/31/90] Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-155 Alternatives for accommodating religious practices. Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules or work assignments. The following alternatives are ways of accommodating the conflict between work schedules and religious practices which the commission believes the employers should consider as part of their obligation to accommodate. These suggestions are not meant to be all-inclusive, as there are other alternatives which may reasonably accommodate an individual's religious practices. However, some alternatives for accommodating an individual's religious practices could, to varying degrees, disadvantage the individual in terms of wages, desirability of position, or career opportunities. The obligation to provide equal employment opportunity to the maximum extent possible, irrespective

of religious beliefs, requires that the employer or other covered entity offer the alternative which least disadvantages the individual requesting the accommodation and does not cause undue hardship on the employer.

Some examples of alternatives for accommodating religious practices are:

(1) Voluntary substitutes:

- (A) Reasonable accommodation without undue hardship is possible where a voluntary substitute with substantially similar qualifications is available.
- (B) The obligation to accommodate requires that employers do everything possible to facilitate the securing of a voluntary substitute with substantially similar qualifications.
- (C) Some means of doing this which would not involve substantial costs are to:
 - (i) Allow the individual seeking the accommodation to secure a substitute from co-employees;
 - (ii) Publicize policies regarding accommodation and voluntary substitution;
 - (iii) Promote an atmosphere in which such substitutions are favorably regarded; or
 - (iv) Provide a central file, bulletin board, or other means for matching voluntary substitutes with positions for which substitutes are needed.

(2) Flexible scheduling:

- (A) The creating of flexible work schedule is one means of providing reasonable accommodation for the religious practices of employees or prospective employees.
- (B) The following list is an example of areas in which flexibility might be introduced:
 - (i) Flexible arrival and departure times;
 - (ii) Floating or optional holidays;
 - (iii) Flexible work breaks;
 - (iv) Use of lunch time in exchange for early departure;
 - (v) Staggered work hours; or
 - (vi) Permitting an employee to make up lost time due to the observance of a religious practice.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-156 Payment of dues to labor organizations. Some

collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit compliance with such a provision, the labor organization shall accommodate the employee by not requiring the employee to join the organization and by permitting the employee to donate a sum equivalent to dues to a nonreligious, nonlabor related charitable organization exempt from taxation under section 501 of the Federal Internal Revenue Code. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-157 Undue hardship. (a) The employer or other covered entity has the burden of proving that an undue hardship renders unreasonable the required accommodations to the religious needs of the individual.

(b) An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require more than minimum cost. What constitutes minimum cost shall be determined with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. For example, costs, such as regular payment of premium wages for substitutes, would constitute undue hardship; however, the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs of providing a reasonable accommodation. Generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a minimum of cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(c) Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices and when doing so would deny another employee a job or shift preference guaranteed by that system. Arrangements for voluntary substitutes and swaps do not constitute undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in chapter 378, HRS, or this subchapter precludes an employer and a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

SUBCHAPTER 8

ANCESTRY DISCRIMINATION

§12-46-171 General policies. (a) Chapter 378, HRS, prohibits any employer or covered entity from discriminating in employment because of ancestry, except where ancestry is a bona fide occupational qualification. The commission defines ancestry discrimination broadly and will examine with particular concern charges alleging that individuals have been denied equal employment opportunity for reasons related to ancestry, such as:

- (1) Marriage to or association with persons of an ancestral group;
- (2) Membership in or association with an organization identified with or seeking to promote the interest of an ancestral group;
- (3) Attendance or participation in schools, churches, temples, or mosques, generally used by persons of an ancestral group; and
- (4) Because an individual's name or spouse's name is associated with an ancestral group.

(b) Chapter 378, HRS, is intended to eliminate covert as well as overt practices of discrimination, and the commission will therefore examine charges of unlawful discrimination principles, such as disparate treatment and adverse impact. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-8)

§12-46-172 Bona fide occupational qualification (BFOQ). (a) The BFOQ exception as to ancestry shall be strictly and narrowly construed.

(b) The burden of proving that ancestry is a BFOQ rests upon the employer or other covered entity seeking the exception. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-3)

§12-46-173 Citizenship requirements. It shall be an unlawful discriminatory practice where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of ancestry. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-174 Language. (a) Any rule requiring employees to speak only English or other specific language at all times in the work place, including work breaks, shall be considered a violation of chapter 378, HRS.

(b) An employer may have a rule requiring that employees speak only English at certain times where the employer can show that the rule is justified by business necessity.

(c) If an employer believes that it has a business necessity for a speak-English-only rule at certain times, the employer shall inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the commission shall consider the application of the rule as evidence of discrimination on the basis of ancestry.

(d) Discrimination on the basis of language, including speech peculiar to a certain ancestry, a foreign accent, vernacular language, and dialects within the same national group, shall be a violation of chapter 378, HRS, unless language is a BFOQ for the particular position involved. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-175 Harassment. (a) Harassment on the basis of ancestry is a violation of chapter 378, HRS.

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's ancestry constitute harassment when this conduct:

- (1) Has the purpose or effect of creating an intimidating, hostile, or offensive working environment;
- (2) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- (3) Otherwise adversely affects an individual's employment opportunity.

(c) The employer has an affirmative duty to maintain a working environment free of harassment on the basis of ancestry.

(d) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of ancestry regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in a supervisory or agency capacity.

(e) With respect to conduct between fellow employees, an employer shall be responsible for acts of harassment in the workplace on the basis of ancestry, where the employer, its agent, or supervisory employee, knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(f) An employer may be held responsible for acts of non-employees with respect to harassment of employees on the basis of

ancestry, where the employer, its agent, or supervisory employee, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those non-employees.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-176 Employee selection. (a) Any test, requirement, or selection procedure which has an adverse impact or involves disparate treatment on the basis of ancestry is a violation of chapter 378, HRS.

(b) Because height and weight requirements tend to exclude individuals on the basis of ancestry, they shall not be used unless excepted as a BFOQ. [Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

§12-46-177 Pre-employment inquiries. (a) An employer or other covered entity shall recruit employees of all ancestries for all jobs. An employer or other covered entity placing advertisements indicating specific language requirement is in violation of chapter 378, HRS, unless it is a BFOQ for the particular job involved.

(b) A pre-employment interview or an employment application form shall not include questions or requests for information that would tend to disclose a person's ancestry. Examples of such questions or requests for information are:

- (1) "Of what country are you a citizen?";
- (2) Whether applicant is naturalized or native-born U.S. citizen;
- (3) Requirement that applicant produce naturalization papers;
- (4) Birthplace of applicant;
- (5) Requirement that applicant submit proof of birth document prior to hiring;
- (6) Applicant's nationality, ancestry, national origin, descent, or parentage;
- (7) Language commonly used by applicant;
- (8) How applicant acquired the ability to read, write, or speak a foreign language; and
- (9) Names of organizations to which the applicant belongs if that information would indicate through character or name the ancestry of the membership.

[Eff 12/31/90] (Auth: HRS §§368-3, 378-8) (Imp: HRS §§368-3, 378-2)

SUBCHAPTER 9

DISABILITY DISCRIMINATION

§12-46-181 General provisions. Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment against individuals or persons because of a disability. This subchapter reflects the protections which existed under state law protecting persons with handicapped status and is declaratory of existing law. In 1992, the Legislature replaced the term "handicapped status" with disability but retained the same definition. Persons with a disability are entitled to equal employment opportunities as are available to persons without a disability. The examples are used to provide guidance to the public and only illustrate the particular point or principle to which they relate in the rules. They should not be taken out of context as statements of policy that would apply in different circumstances. To the greatest extent possible, the commission will interpret the rules consistent with the examples, however, the commission shall review each case on an individual basis in an effort to seek an equitable application of this subchapter. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-182 Definitions. As used in this subchapter, unless the context otherwise requires:

"Being regarded as having such an impairment" means:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated or considered by an employer or other covered entity as being so limited;

Example:

An employee has mild hypertension which is not substantially limiting. If the employer reassigns the employee to less strenuous work because of a belief that the employee is not able to do the regular work, the employer regarded the individual as having a substantially limiting impairment.

Example:

An individual has a back condition, such as spondylolysis, which is not substantially limiting. If an employer does not hire the individual because of concerns of future risk of injury, the employer regarded the

individual as having a substantially limiting impairment.

- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or

Example:

An employee has a prominent facial scar or disfigurement which is not substantially limiting. If the employer changes the duties of the employee because of the negative reactions of customers or co-employees, the employer regarded the individual as having a substantially limiting impairment.

- (3) Has none of the impairments covered in the definition of mental or physical impairments but is treated or considered by an employer or other covered entity as having a substantially limiting impairment.

Example:

An employee, who does not have HIV, is discharged by the employer because of false rumors that the employee has HIV. Even though the employee has no impairment, the employer regarded the individual as having a substantially limiting impairment.

"Bona fide occupational qualification" means:

- (1) Standards, tests, criteria, methods of administration, or other employment actions which exclude or discriminate against a class of persons on the basis of a specified physical or mental impairment, medical condition, or disability; and:
 - (A) All or substantially all persons with the impairment, condition, or disability:
 - (i) Are unable to perform the essential job functions with or without reasonable accommodation; or
 - (ii) Pose a direct threat which cannot be eliminated or reduced by reasonable accommodation; and
 - (B) The essence of the business would be undermined if all persons with the impairment, condition, or disability were not excluded.

Example:

A policy of not hiring any person with a

particular back condition excludes a class of persons based upon a specified physical impairment. In order to justify the policy as a bona fide occupational qualification, the employer must establish through factual evidence that all or substantially all persons with the back condition cannot do the essential functions of the particular job or pose a direct threat to self or others and no reasonable accommodations are possible. It is not enough to show that "some" people cannot do the job or pose a direct threat. The employer must also establish that the essence (central purpose or principal function) of the business would be undermined without the exclusionary policy.

- (2) The bona fide occupational qualification exception will be strictly and narrowly construed and based upon an examination of the employer's business requirements and the totality of circumstances on a case-by-case basis.

"Contractual or other arrangement" means, but is not limited to, a relationship with an employment or referral agency; labor union, including collective bargaining agreements; an organization providing fringe benefits to an employee of the employer or other covered entity; or an organization providing training and apprenticeship programs.

"Direct threat" means:

- (1) A significant risk of substantial harm to the health or safety of the person or others that cannot be eliminated or reduced by reasonable accommodation based upon an individualized assessment. The risk of harm should be identifiable, substantial, current, and probable.
- (2) The factors to be considered include:
 - (A) The harm that may result if the person with a disability performed the essential job functions;
 - (B) The duration of the risk of harm;
 - (C) The nature and severity of the potential harm;
 - (D) Whether the harm may be "significantly greater" than if a non-disabled person performed the essential job functions;
 - (E) The likelihood that the potential harm will occur;
 - (F) The imminence of the potential harm; and
 - (G) Whether a reasonable accommodation can eliminate or

reduce the risk of harm below the level of direct threat.

Example:

An employee with epilepsy who works with hazardous machinery may not automatically pose a direct threat to self or others. The employer must first make an individualized evaluation taking into account such factors as the type of job; the aspect of the disability and harm it may cause if the employee performed the essential job functions; the duration of the risk of harm; the types of seizures which have occurred; whether there is warning of seizures; the degree of seizure control; the employee's reliability in taking medication; any side effects; whether the harm resulting from the employee's epilepsy is significantly greater than for employees without epilepsy; and possible reasonable accommodations. Persons who have had no seizures because they regularly take medication, or who have sufficient advanced warning of a seizure so that they can stop hazardous activity, would not pose a direct threat to self or others because the risk of harm was not substantial, current, or probable.

- (3) The belief that a person may pose a direct threat to self or others shall not be based upon subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature and effect of a particular disability or disabilities in general. Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used to disqualify a person with a disability.

Example:

A person with a history of disabling mental illness cannot be rejected by an employer because of a generalized fear that the work would trigger a relapse of the illness. The mere possibility that a person with a disability may harm the health or safety of self or others is insufficient to establish a direct threat because the risk of harm is not identifiable, substantial, current, or probable.

"Disability" means:

- (1) With respect to a person:
 - (A) Having a physical or mental impairment which

substantially limits one or more major life activities;

- (B) Having a record of such an impairment; or
- (C) Being regarded as having such an impairment.

- (2) Disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs.

"Drug" means a controlled substance, as defined in the Uniform Controlled Substances Act, chapter 329, HRS. Illegal use of drugs means the use of drugs not taken under the supervision of a licensed health care professional or other use not authorized by the Uniform Controlled Substances Act.

"Essential functions" means:

- (1) The fundamental job duties of the employment position the person with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.
- (2) In determining whether a job function is essential, the focus should be on the purpose and importance of the function as it relates to the result to be accomplished, rather than on the manner in which the function is presently performed. Although it may be essential that a certain function be performed, often it is not essential that it be performed in a particular way, as long as the same result is achieved.
- (3) A job function may be considered essential for any of several reasons, including, but not limited to, the following:
 - (A) The function may be essential because the reason the position exists is to perform that function;
 - (B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; or
 - (C) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
- (4) Evidence of whether a particular function is essential should reflect the actual functioning and circumstances of

the particular job. Factors to be considered include, but are not limited to:

- (A) The employer's judgment as to which functions are essential;
- (B) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (C) The amount of time spent on the job performing the function;
- (D) The consequences of not requiring the incumbent to perform the function;
- (E) The terms of a collective bargaining agreement;
- (F) The work experience of past incumbents in the job; or
- (G) The current work experience of incumbents in similar jobs.

"Having a record of such impairment" means having a history of, or having been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

Example:

Persons who have had cancer, heart disease, other debilitating illnesses, or mental illness, which substantially limited a major life activity, and whose illnesses are either cured, controlled, or in remission, have a history of having a physical impairment that substantially limits a major life activity.

"Job-related and consistent with business necessity" means:

- (1) A legitimate measure or qualification for a specific job which has a substantial relationship to successful performance of essential job functions. Factors to be considered include, but are not limited to:
 - (A) Ability to perform the essential job functions;
 - (B) Manifest relationship to the job in question;
 - (C) Manifest relationship to a legitimate job performance objective of the employer, such as safety and efficiency; or
 - (D) Unavailability of any less discriminatory alternatives.
- (2) Factors that are not to be considered include, but are not limited to:
 - (A) Customer preference;
 - (B) Employee morale;
 - (C) Corporate image;

- (D) Convenience;
- (E) Future need to fill other positions in a line of progression where the other positions have qualification standards or other criteria, which are bona fide occupational qualifications based upon disability, not applicable to the particular position;
- (F) Possibility of increased insurance costs because of disability; and
- (G) Possibility that the person may have a high rate of absenteeism in the future because of disability.

"Major life activities" means basic activities and functions which the average person in the general population can perform with little or no difficulty, including, but not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, sitting, standing, lifting, reaching, and working.

"Physical or mental impairment" means:

- (1) In general:
 - (A) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
 - (B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- (2) Physical or mental impairments include, but are not limited to, such conditions, diseases, and infections as: orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; AIDS; HIV infection or seropositivity; cancer; heart disease; diabetes; alcoholism; mental retardation; emotional illness; specific learning disabilities; developmental disabilities; and manic depression.
- (3) Physical or mental impairments do not include physical, psychological, environmental, cultural, or economic characteristics, such as, but not limited to, eye or hair color; left-handedness; height, weight, or muscle tone that do not result from a physiological disorder; a characteristic predisposition to illness or disease;

- pregnancy; personality traits such as poor judgment or a quick temper when they are not symptoms of a mental or psychological disorder; poverty; a lack of education or illiteracy; a prison record; and sexual orientation.
- (4) Drug use shall be considered a mental or physical impairment when a person:
- (A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in current illegal use of drugs;
 - (B) Has otherwise been rehabilitated successfully and is no longer engaging in current illegal use of drugs;
 - (C) Is participating in a supervised rehabilitation program, a recognized self-help program, or an employee assistance program, and is under the supervision of a licensed health care professional for the treatment of drug use and is no longer engaging in current illegal use of drugs; or
 - (D) Is erroneously regarded as engaging in such use, but is not engaging in such use.

"Qualification standards" means:

- (1) The personal and professional attributes including the skill, experience, education, physical, medical, safety, and other job-related requirements established by an employer or other covered entity as requirements which a person must meet in order to be eligible for the position held or desired.
- (2) The term "qualification standard" may include a requirement that a person shall not pose a direct threat to the health or the safety of the person or others in the workplace.

"Qualified person with a disability" means a person with a disability who satisfies:

- (1) The requisite skill, experience, education, and other job-related qualification standards of the employment position such person holds or desires; and
- (2) Who, with or without reasonable accommodation, can perform the essential functions of such position.

"Reasonable accommodation" means:

- (1) In general:
 - (A) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such

- qualified applicant desires;
 - (B) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified person with a disability to perform the essential functions of that position; or
 - (C) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy the same or equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
- (2) Reasonable accommodation may include, but is not limited to:
- (A) Making existing facilities used by employees readily accessible to and usable by persons with disabilities; and
 - (B) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for persons with disabilities.

"Substantially limits" means:

- (1) In general:
 - (A) Unable to perform a major life activity that the average person in the general population can perform; or
 - (B) Significantly restricted as to the condition, manner, or duration under which a person can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.
- (2) The following factors should be considered in determining whether a person is substantially limited in a major life activity:
 - (A) The nature and severity of the impairment;
 - (B) The duration or expected duration of the impairment; and
 - (C) The permanent or long-term impact of, or the expected permanent or long-term impact of the impairment.
- (3) Temporary, non-chronic impairments of short duration with

little or no long-term impact usually are not disabilities. Such non-disabling impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.

- (4) Certain impairments such as blindness, deafness, HIV infection, and AIDS are by their nature substantially limiting.
- (5) The limitation resulting from an impairment is determined without regard to mitigating measures such as medicines or assistive or prosthetic devices.
- (6) With respect to the major life activity of "working":
 - (A) The term "substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Example:

A baseball pitcher who develops a shoulder injury and can no longer pitch would not be substantially limited in working because of not being able to perform the single, particular job of pitching in baseball.

- (B) In addition to the factors listed in the definition of "substantially limits", the following factors should be considered in determining whether a person is substantially limited in the major life activity of "working":
 - (i) The geographical area to which the person has reasonable access;
 - (ii) The job from which the person has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the person is also disqualified because of the impairment (class of jobs); and

- (iii) The job from which the person has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the person is also disqualified because of the impairment (broad range of jobs in various classes).

"Undue hardship" means:

- (1) Significant difficulty or expense incurred by an employer or other covered entity with respect to the provision of an accommodation.
- (2) In determining whether an accommodation would impose an undue hardship on an employer or other covered entity, factors to be considered include:
 - (A) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions or outside funding, or both;
 - (B) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
 - (C) The overall financial resources of the employer or other covered entity, the overall size of the business of the employer or other covered entity with respect to the number of its employees, and the number, type, and location of its facilities;
 - (D) The type of operation or operations of the employer or other covered entity, including the composition, structure and functions of the work force, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer or other covered entity;
 - (E) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business; and
 - (F) The impact of the accommodation upon collective bargaining agreements or civil service laws. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2, 378-3)

§12-46-183 Discrimination prohibited. (a) It is unlawful for an employer or other covered entity to discriminate on the basis of disability against a qualified person with a disability in regard to:

- (1) Recruitment, advertising, and job application procedures;
- (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation and changes in compensation;
- (4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (5) Leaves of absence, sick leave, or any other leave;
- (6) Fringe benefits available by virtue of employment, whether or not administered by the employer or other covered entity;
- (7) Selection and financial support for training, including apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; and
- (8) Any other term, condition, or privilege of employment, including activities sponsored by an employer or other covered entity such as social and recreational programs.

(b) The term discrimination includes, but is not limited to, the acts made unlawful in sections 12-46-184 through 191, inclusive. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-184 Limiting, segregating, and classifying. It is unlawful for an employer or other covered entity to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-185 Contractual or other arrangements. (a) It is unlawful for an employer or other covered entity to participate in a contractual or other arrangement or relationship that has the effect of subjecting the employer's or entity's own qualified applicant, employee, member, beneficiary, apprentice, trainee, or other related person with a disability to the discrimination prohibited by this subchapter.

(b) This section applies to an employer or other covered entity, with respect to its own applicants, employees, members,

beneficiaries, apprentices, trainees, or other related persons whether the employer or entity offered the contract or initiated the relationship, or whether the employer or entity accepted the contract or acceded to the relationship. An employer or other covered entity is not liable for the actions of the other party or parties to the contract which only affect that other party's employees, applicants, or other related persons. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-186 Standards, criteria, or methods of administration.

It is unlawful for an employer or other covered entity to use standards, criteria, or methods of administration:

- (1) That have the effect of discriminating on the basis of disability; or
- (2) That perpetuate the discrimination of others who are subject to common administrative control;

unless the employer or covered entity justifies the need for having the standard, criterion, or method of administration. Standards, criteria, or methods of administration which exclude a class of persons on the basis of a specified physical or mental impairment, medical condition, or disability must be shown to be bona fide occupational qualifications. Other standards, criteria, or methods of administration which have the effect of discriminating on the basis of disability or perpetuate the discrimination of others subject to common administrative control must be shown to be job-related and consistent with business necessity. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-187 Failure to make reasonable accommodation. (a)

It is unlawful for an employer or other covered entity not to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such employer or entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business. An employee does not have to specifically request a "reasonable accommodation", but must only let the employer know that some adjustment or change is needed to do a job because of limitations caused by a disability.

(b) To determine the appropriate reasonable accommodation, it shall be necessary for an employer or other covered entity to initiate an interactive process, after a request for an accommodation, with the qualified person with a disability in need of the accommodation. This process shall identify the precise limitations resulting from the disability and potential reasonable

accommodations that could overcome those limitations.

(c) It is unlawful for an employer or other covered entity to deny employment opportunities to an otherwise qualified applicant or employee with a disability based on the need of such employer or entity to make reasonable accommodation to such person's physical or mental impairments.

(d) A qualified person with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified person chooses not to accept. However, if such person, after notice by the employer or other covered entity of the possible consequences of rejecting, rejects a reasonable accommodation, aid, service, opportunity, or benefit that enables the person to perform the essential functions of the position held or desired and cannot, as a result of that rejection, perform the essential functions of the position, the person will not be considered a qualified person with a disability. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2, 378-3)

§12-46-188 Qualification standards, tests, and other selection criteria. (a) It is unlawful for an employer or other covered entity to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out a person with a disability or a class of persons with disabilities unless the employer or other covered entity justifies the need for the standard, test, or selection criterion.

(b) Standards, tests, or selection criteria that screen out a person with a disability or a class of persons with disabilities based upon specified physical and mental impairments, medical conditions, or disabilities must be shown to be bona fide occupational qualifications.

Example:

A qualification standard which excludes all persons who have back impairments would not be considered a bona fide occupational qualification unless the employer can establish that all or substantially all persons with back impairments cannot perform the essential job functions or pose a direct threat to self or others, with or without reasonable accommodation, and the essence of the business would be undermined without the standard.

(c) Other standards, tests, or selection criteria, not based upon specified physical or mental impairments, medical conditions, or disabilities, that screen out a person with a disability or a class of persons with disabilities must be shown to be job-related for the

position in question and consistent with business necessity.

Example:

A qualification standard which excludes persons who cannot lift certain weights would not be considered job-related and consistent with business necessity unless the employer can establish that the lifting requirement was an essential job function and there is no reasonable accommodation available.

(d) It is unlawful for an employer or other covered entity to discriminate against a person with a disability for reasons related to safety unless the person poses a direct threat to self or others. The determination that a person with a disability poses a "direct threat" shall be based on an individualized assessment of the person's present ability to safely perform the essential functions of the job, the person's past and current job history, and reasonable medical judgment that relies on the current medical knowledge or the best available objective or scientific evidence, not speculation, considering the factors defined in "direct threat". The individualized assessment made by the employer or covered entity shall identify and document the aspect of the disability and specific risk of harm that would pose the direct threat to self or others. If a person poses a direct threat, the employer or other covered entity must try to eliminate or reduce the threat to an acceptable level through provision of a reasonable accommodation.

(e) It is unlawful for an employer or other covered entity to use qualification standards, tests, or selection criteria to exclude a person with a disability or a class of persons with disabilities because the particular position is part of a line of progression to which persons in the particular position are expected to advance even though the qualification standard can be justified for some of the positions in the line unless the standard, test, or criterion can be justified for the particular position. The justification for the qualification standard, test, or selection criterion shall be determined according to subsection (b), (c), or (d).

Example:

A deaf person cannot be denied an entry level position because the person to be hired is expected to progress to higher positions with qualification standards which may exclude the deaf. Even though the exclusion of the deaf for any higher position can be shown to be a bona fide occupational qualification, the employer must also establish that excluding deaf persons in the entry level

position is a bona fide occupational qualification.

(f) It is unlawful for an employer or other covered entity to fail to select or administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure). [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-189 Retaliation, coercion, interference, or intimidation. (a) It is unlawful to discriminate or take an adverse action against any person because that person has opposed any act or practice made unlawful by this subchapter or because that person made a charge, testified, assisted, or participated in any manner relating to an investigation, hearing, or proceeding to enforce any provision contained in this subchapter. (b) It is unlawful to discriminate or take an adverse action against an employee based upon the employee's refusal to participate in a medical examination or inquiry under section 12-46-191(c), which is not job-related and consistent with business necessity, or a voluntary medical examination or inquiry under section 12-46-191(e).

(c) It is unlawful to coerce, intimidate, threaten, harass, or interfere with any person in the exercise or enjoyment of, or because that person aided, counselled, or encouraged any other person in the exercise of, any right granted or protected by this subchapter.

(d) It is unlawful to aid, abet, incite, or compel any person to engage in any act made unlawful by this subchapter.

(e) It is unlawful to attempt to engage in any act made unlawful by this subchapter. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-190 Prohibited medical examinations and inquiries. (a) Except as permitted by section 12-46-191, it is unlawful for an employer or other covered entity to:

- (1) Conduct a medical examination of an applicant; or
- (2) Make inquiries as to whether an applicant is a person with a disability or as to the nature or severity of such disability.

(b) Except as permitted by section 12-46-191, it is unlawful for an employer or other covered entity to:

- (1) Require a medical examination of an employee; or
- (2) Make inquiries as to whether an employee is a person with a disability or as to the nature or severity of such disability. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-191 Medical examinations and inquiries specifically permitted. (a) An employer or other covered entity may make pre-employment inquiries into the ability of an applicant to perform essential job functions and ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform essential job functions.

(b) An employer or other covered entity may require a medical examination or inquiry, or both, after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination or inquiry, or both, if all entering employees in the same job category are subjected to such an examination or inquiry, or both, regardless of disability. Information obtained under this subsection shall not be used for any purposes inconsistent with this subchapter and must be maintained in accordance with subsection (f). Such post-offer medical examinations conducted in accordance with this subsection do not have to be job-related and consistent with business necessity.

- (1) If qualification standards, tests, or selection criteria are used to screen out a person with a disability or a class of persons with disabilities on the basis of a specified physical or mental impairment, condition, or disability, the criteria must be shown to be a bona fide occupational qualification. Other qualification tests, standards, or selection criteria that screen out a person with a disability or class of persons with disabilities must be shown to be job-related and consistent with business necessity.
- (2) If any adverse consequences result from a post-offer medical examination, the employer or other covered entity shall base its action on a medical examination conducted in accordance with subsection (d).

(c) An employer or other covered entity may require a medical examination or inquiry, or both, of an employee that is job-related and consistent with business necessity. The employer or other covered entity bears the burden of establishing that such medical examination or inquiry, or both, is job-related and consistent with business necessity and must provide specific instances or examples of

the employee's conduct which raised concerns about his or her inability to perform essential job functions or direct threat to self or others, except where an employee is returning to work after receiving disability benefits, such as workers compensation.

Example:

In order to justify requiring an employee to undergo a medical examination, an employer must establish that an employee's recent work performance raised reasonable concerns that the employee could not perform essential job functions or posed a direct threat to self or others, with or without reasonable accommodation. The employer must articulate specific instances which raised such concerns, except where an employee is returning to work after receiving disability benefits.

(d) An employer or other covered entity which requires an applicant or employee to undergo a medical examination shall provide every examiner with sufficient job information to assess the applicant's or employee's ability to perform essential job functions or the applicant's or employee's direct threat potential. The job information shall include an accurate written description of the essential responsibilities and functions of the job, and the following rules: the definition of reasonable accommodation in section 12-46-182 and section 12-46-187. If the employer believes that the applicant or employee may pose a direct threat to self or others, the employer shall provide the following rules: the definition of direct threat in section 12-46-182 and section 12-46-188(d). If the applicant or employee wishes to go to a second examiner, the employer or covered entity shall provide the examiner with the same job information. Information obtained under this subsection shall be collected and maintained in accordance with subsection (f).

(e) An employer or other covered entity may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. An employer or other covered entity may make inquiries into the ability of an employee to perform essential job functions. Information obtained under this subsection shall be maintained in accordance with subsection (f).

(f) All information related to or obtained under subsections (b), (c), (d), and (e) regarding the medical examination, condition, or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (2) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- (3) Commission employees investigating compliance with this subchapter shall be provided any and all information on request.

Information obtained under subsections (b), (c), (d), and (e) regarding the medical condition or history of any applicant or employee shall not be disclosed to persons who are not entitled to have access to the information or used for any purpose inconsistent with this subchapter.

(g) A test or inquiry to determine the illegal use of drugs is not considered a medical examination or inquiry under this subchapter. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-192 Specific activities permitted. (a) An employer or other covered entity:

- (1) May prohibit the illegal use of drugs and the consumption of alcohol at the workplace by all employees;
- (2) May require that employees not be under the influence of alcohol or be engaging in the use of illegal drugs at the workplace;
- (3) May hold an employee who engaged in the use of illegal drugs to the same qualification standards for employment or job performance and behavior to which the employer or other covered entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's use of illegal drugs;
- (4) May hold an employee who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the employer or other covered entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's alcoholism, as long as reasonable accommodation, if requested, is provided for the performance of essential job functions;
- (5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of federal agencies including, but not limited to, the Departments of Defense and Transportation, and of the Nuclear Regulatory

Commission, regarding alcohol and the use of illegal drugs;

- (6) May require that employees employed in sensitive positions comply with the regulations (if any) of the United States Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations; and
- (7) May require a medical examination or inquiry, or both, as permitted in section 12-46-191, or a test or inquiry to determine the illegal use of drugs. However, this subchapter does not encourage, prohibit, or authorize an employer or other covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make an employment decision based on such test results.

(b) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of section 12-46-191(f).

(c) Under title I of the Americans with Disabilities Act, 42 U.S.C. §12113(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which can be transmitted through the handling of food. If a person with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, an employer or other covered entity may refuse to assign or continue to assign such person to a job involving food handling. However, if the person with a disability is a current employee, the employer shall consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling for which he or she is qualified. [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

§12-46-193 Defenses. An employer or other covered entity may raise defenses to an allegation of discrimination under this subchapter including, but not limited to, the following:

- (1) **Inability to perform.** It may be a defense to a charge of discrimination brought under this subchapter that a person with a disability is unable to perform an essential job function with or without a reasonable accommodation.
- (2) **Business necessity.** It may be a defense to a charge of discrimination brought under this subchapter that:

- (A) An alleged application of qualification standards, tests, or criteria used in the selection of employees screens out or tends to screen out or otherwise denies a job or benefit to a person with a disability; or
 - (B) A uniformly applied standard, criterion, method of administration, or policy has a disparate impact on a person with a disability or a class of persons with disabilities; and
- the challenged standard, test, criterion, method, or policy has been shown by the employer or other covered entity to be job-related and consistent with business necessity in light of the factors in the definition of job-related and consistent with business necessity; and performance of essential job functions cannot be accomplished with reasonable accommodation, as required under this subchapter.

Example:

A job applicant for a field sales representative position, who was not hired, challenges a driver's license requirement as discriminating against persons who cannot obtain licenses because of their disabilities. An employer may be able to defend by showing that driving was an essential job function, no other transportation alternative (i.e. bus or Handivan) having less adverse effects upon persons with disabilities was available; and any accommodation would cause an undue hardship because field sales representatives had to work alone.

- (3) **Bona fide occupational qualification.** It may be a defense to a charge of discrimination that an application of qualification standards, tests, selection criteria, policies, or methods of administration which is applied to a class of persons on the basis of a specified physical or mental impairment, medical condition, or disability has been shown by the employer or other covered entity to be a bona fide occupational qualification.

Example:

An employer which does not consider for employment a person with hypertension because of a policy against hiring persons with hypertension due to safety concerns must establish that all or substantially all persons with hypertension, regardless of severity, would pose a direct

threat to self or others; no reasonable accommodations are possible; and the essence of the business would be undermined if all persons with hypertension were not excluded.

- (4) **Undue hardship.** It may be a defense to a charge of not making reasonable accommodation that a requested or necessary accommodation would impose an undue hardship on the operation of the business.

Example:

An employer would not be required to make unreasonable structural changes or expensive equipment alterations if there is significant difficulty or expense based upon the factors listed in the definition of undue hardship.

- (5) **Direct threat.** It may be a defense to a charge of discrimination under this subchapter that a person with a disability posed a direct threat to the health or safety of the person or others that cannot be eliminated or reduced by reasonable accommodation.
- (6) **Specific permitted activity.** It may be a defense to a charge of discrimination that the alleged discriminatory action is specifically permitted under this subchapter or by section 378-3, HRS.
- (7) **Good faith.** If the employer or covered entity demonstrates good faith efforts, in consultation with the person with a disability who has requested an accommodation, to identify and make a reasonable accommodation that would not cause an undue hardship on the operation of the business, the employer or other covered entity may be liable for compensatory damages and other relief but would not be liable for punitive damages if the good faith offer of accommodation is found to be not reasonable." [Eff 8/18/94] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2, 378-3)

SUBCHAPTER 20

REAL PROPERTY TRANSACTION DISCRIMINATION

§12-46-301 General provisions. The purpose of this subchapter is to implement laws prohibiting discrimination in real property transactions toward the goal of eliminating such discrimination and to implement changes made by Act 171, Session Laws of Hawaii 1992, to conform state law to Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988. Chapter 515, HRS, prohibits discriminatory practices by an owner, any person engaging in a real property or real estate transaction, or a real estate broker or salesperson against another person because of a protected basis. The examples are used to provide guidance to the public and only illustrate the particular point or principle to which they relate in the rules. They should not be taken out of context as statements of policy that would apply in different situations. To the greatest extent possible, the commission will interpret the rules consistent with the examples, however, the commission shall review each case on an individual basis in an effort to seek an equitable application of this subchapter. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §368-1; HRS Chapter 515)

§12-46-302 Definitions. As used in this subchapter, unless the context otherwise requires:

"Accessible" means a housing accommodation constructed in conformity with the appropriate requirements of ANSI A117.1-1986 or the Fair Housing Accessibility Guidelines issued by the Department of Housing and Urban Development.

"Age" means over the age of majority or emancipated minors.

"Ancestry" means national origin and includes reasons related to ancestry, such as:

- (1) Marriage to or association with persons of an ancestral group;
- (2) Membership in or association with an organization identified with or seeking to promote the interests of an ancestral group;
- (3) Attendance or participation in schools, churches, temples, or mosques, generally used by persons of an ancestral

- group; and
- (4) Because an individual's name or spouse's name is associated with an ancestral group.

"ANSI A117.1-1986" means the 1986 edition of the American National Standards Institute for buildings and facilities providing accessibility and usability for disabled persons.

"Application" means written, oral, or telephone inquiries.

"Blind" means a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or whose visual acuity is greater than 20/200 but is accompanied by a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than twenty degrees. The impairment of sight shall be certified to on forms prescribed by the department of taxation on the basis of a written report on an examination performed by a qualified ophthalmologist or qualified optometrist.

"Business necessity" means a compelling and well established public purpose which also establishes that there is no reasonable alternative means of serving the same purpose with less discriminatory impact.

"Commission" means the civil rights commission.

"Common use areas" means rooms, spaces, or elements inside or outside of a housing accommodation that are made available for the use of residents or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas, and passageways among and between housing accommodations.

"Complainant" means any person, including a tester or associates of a person with a protected basis, who claims to have been injured by a discriminatory real estate transaction practice or who believes that such person will be injured by a discriminatory real estate transaction practice that is about to occur and files a complaint in accordance with chapter 368, HRS, with the commission. The law does not require such persons to expose themselves to the injury involved with the actual act of discrimination before filing a complaint.

"Controlled substance" means any drug, substance, or immediate

precursor included in schedules I through V of part II of chapter 329, HRS.

"Covered multi-family housing accommodations" means buildings consisting of four or more housing accommodations, if such buildings have one or more elevators; and ground floor dwelling units in other buildings consisting of four or more housing accommodations.

"Deaf" means a person whose average loss in the speech frequencies (500-2000 Hertz) in the better ear is eighty-two decibels, A.S.A., or worse. The impairment of deafness shall be certified to by a qualified otolaryngologist on forms prescribed by the department of taxation.

"Disability" means having a physical or mental impairment which substantially limits one or more major life activities, having a record of such impairment, or being regarded as having such an impairment, including persons who have HIV or AIDS. The term does not include current illegal use of or addiction to a controlled substance, or alcohol or drug abuse that threatens the property or safety of others.

"Discriminatory practice" means a practice designated as discriminatory under the terms of this subchapter.

"Domiciled" means residence or physical presence at a location and the intent to remain, and includes a minor child staying in a housing accommodation on a regular basis with a parent or relative because of visitation rights granted by a court, or because of written or unwritten permission from a legal parent.

"Fair Housing Accessibility Guidelines" means guidelines issued by the Department of Housing and Urban Development on March 6, 1991 to provide technical guidance on designing housing accommodations as required by the Fair Housing Amendments Act of 1988.

"Familial status" means the presence of children under eighteen years old in a family, including, but not limited to, a person having custody and domiciled with a minor child or children; a person domiciled with a minor child or children who has written or unwritten permission from the legal parent, such as a hanai relationship; a person who is pregnant; or any person who is in the process of securing legal custody of a minor child or children.

"Guide dog" means any dog individually trained by a licensed guide dog trainer for guiding a blind person by means of a harness attached to the dog and a rigid handle grasped by the person.

"Hanai relationship" includes a child who is taken permanently to reside, be educated, and reared by someone other than the natural parents, traditionally a grandparent or other relative, with the written or unwritten permission of the natural parents.

"Housing accommodation" means any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals; any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as a residence by one or more families; any vacant land which is offered for sale or lease for the construction or location thereon of any building, structure, or portion thereof as the home or residence of one or more individuals; including, but not limited to, houses, apartments, town houses, mobile home parks, trailer courts, condominiums, cooperatives, and time-sharing properties.

"Legitimate non-discriminatory reason" means a bona fide and compelling justification for a practice, policy, or action established by objective proof or evidence, which standing alone would have resulted in the same practice, policy, or action.

"Limitation" or **"limit"** includes actions which exclude individuals or persons or result in creating a preference for an individual or person.

"National origin" refers to ancestry and may include the national origin of an ancestor.

"Person" means an individual, corporation, firm, association, society, community, assembly, inhabitant of a district or neighborhood, person known and unknown, the public generally, legal representative, partnership, receiver, trust, trustee, trustee in bankruptcy, the State, or any governmental entity or agency, labor organization, mutual aid company, joint stock company, unincorporated organization, management company, tenant association, fair housing organization, or fiduciary.

"Protected basis" means race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV (human immunodeficiency virus) infection.

"Public use areas" means interior or exterior rooms or spaces of a housing accommodation that are made available to the general public. Public use may be provided at a housing accommodation that is privately or publicly owned.

"Real estate broker or salesperson" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property; or who negotiates or attempts to negotiate any of these activities; or who purports to be engaged in these activities; or who negotiates or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon real property; or who is engaged in the business of listing real property in a publication; or a person employed by or acting on behalf of any of these.

"Real estate transaction" means the advertising, sale, exchange, rental, lease, management, or use of real property, including, but not limited to, any actions related to real property after the advertising, sale, exchange, rental, or lease; the cancellation or termination of a sale, exchange, rental, or lease of real property; and the imposition of rules, policies, and practices affecting the terms, conditions, enjoyment, and privileges of using real property. It does not include commercial property that is advertised, sold, exchanged, rented, leased, managed, or used for the purposes of operating a business.

"Real property" means buildings, dwelling units, structures, real estate, lands, tenements, leaseholds, interest in real estate cooperatives, condominiums, mobile home parks, and hereditaments, corporeal and incorporeal, or any interest therein.

"Real property transaction" means real estate transaction as the term is used in this subchapter.

"Reasonable assurance" means actions or promises which establish that certain other actions will be taken in the future; provided that the reasonableness of an assurance shall be examined by giving due consideration to the needs of a reasonable prudent person in the same or similar circumstances.

"Reasonable restriction" shall not include any restriction, prohibition, policy, practice, or rule that allows any owner or person to refuse to negotiate or refuse to engage in a real estate transaction because of another person's protected basis or to commit a discriminatory practice prohibited under this subchapter;

provided that the reasonableness of a restriction shall be examined by giving due consideration to the needs of a reasonable prudent person in the same or similar circumstances.

"Religious institution" means any religious institution or organization, or any charitable or educational organization operated, supervised, or controlled by a religious institution or organization, which does not restrict membership to persons on the basis of race, color, or ancestry.

"Respondent" means any person, owner of real property, real estate broker, or salesperson, against whom a complaint or petition has been filed with the commission; the party against whom relief is sought; or any party who contests or controverts a proceeding or petition.

"Service animal" means any animal that is trained to provide those life activities limited by the disability of the person.

"Signal dog" means any dog that is trained to alert a deaf person to intruders or sounds.

"Steering" means the practice of directing persons who seek to enter into a real estate transaction toward or away from real property in order to deprive them of the benefits of living in a discrimination-free environment, and actions designed to discourage persons from seeking housing in a particular community, neighborhood, development, housing accommodation, or part thereof.

"Tester" means any person seeking to engage in a real estate transaction, regardless of the person's actual intent to engage in such a transaction, who has been subject to discriminatory practices in real estate transactions because of a protected basis, and tenant associations or fair housing organizations whose members include such persons. [Eff 10/15/93; am 5/3/99] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §§515-2, 515-3, 515-8)

§12-46-303 Construction. This subchapter shall be liberally construed according to the fair import of their terms toward the goal of eliminating discrimination in real estate transactions. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-1)

§12-46-304 Record keeping requirements. (a) Any records of real estate transactions made or kept by an owner, any person engaging in a real estate transaction, or real estate broker or

salesperson involving the lease or rental of a housing accommodation:

- (1) In a building which has four or more housing accommodations; or
- (2) Which is owned by a person who owns three or more housing accommodations; shall be preserved for one year from the date of making the record or the occurrence of the real estate transaction practice, policy, or action involved, whichever is later. The records shall include, but not be limited to, advertisements, applications, and any other information furnished by the person seeking the housing accommodation, lease or rental agreements, eviction records, any records affecting changes in the terms, conditions, privileges, or enjoyment of tenancy, occupancy, or use of the premises, and corporate or association minutes and resolutions adopting house rules affecting occupancy.

(b) Any other records of real estate transactions, not involving a lease or rental, made or kept by an owner, any person engaging in a real estate transaction, or real estate broker or salesperson shall be preserved for one year from the date of making of the record or the occurrence of the real estate transaction practice, policy, or action involved, whichever is later.

(c) Where a complaint has been filed or a civil action has been brought against a respondent under chapter 368 or 515, HRS, the respondent shall preserve all records relevant to the complaint or action until final disposition of the complaint or action, as defined in section 12-46-21(c)(2).

(d) Where a respondent is required to preserve records under this section and the records have been destroyed or are unavailable, in an investigation or proceeding on a complaint filed with the commission or in a civil action it may be presumed that the evidence contained in the records was adverse to the interest or position of the respondent. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §§515-1, 515-3, 515-5, 515-6, 515-9)

§12-46-305 Discriminatory practices. It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson because of a person's protected basis:

- (1) To refuse to engage in a real estate transaction, evict, or terminate a tenancy;
- (2) To discriminate in the terms, conditions, enjoyment, or privileges of a real estate transaction, or in the

furnishing of facilities or services in connection therewith;

- (3) To refuse to receive or fail to transmit a bona fide offer to engage in a real estate transaction from a person;
 - (4) To refuse to negotiate for a real estate transaction with a person;
 - (5) To represent to a person that real property is not available for inspection, sale, rental, or lease when, in fact, it is available, or to fail to bring a property listing to the person's attention, or to refuse to permit the person to inspect real property, or to steer a person seeking to engage in a real estate transaction;
 - (6) To print, circulate, post, or mail, or cause to be published a statement, advertisement, or sign, or to use a form of application for a real estate transaction, or to make a record or inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;
 - (7) To offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith;
 - (8) To discriminate against or deny a person access to, or membership or participation in any multiple listing service, real estate broker's organization, or facility involved either directly or indirectly in real estate transactions, or to discriminate against any person in the terms or conditions of such access, membership, or participation;
 - (9) To engage in harassment; or
 - (10) To institute or apply facially neutral policies or restrictions which result in a disparate adverse impact.
- [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-3)

§12-46-306 Discrimination on the basis of disability. (a) It is a discriminatory practice for an owner or any other person engaging in a real estate transaction, or for a real estate broker or salesperson:

- (1) To refuse to engage in a real estate transaction or to deny equal opportunity to use and enjoy a housing accommodation with a person with a disability because the person uses the services of a guide dog, or signal dog, or

service animal, provided that reasonable restrictions or prohibitions may be imposed upon the person with a disability regarding excessive noise or other problems caused by those animals including:

- (A) Observing applicable laws, including leash laws and pick-up laws;
 - (B) Assuming responsibility for damage caused by the dog or animal;
 - (C) Cleaning the housing unit upon vacating, by fumigation, deodorizing, professional carpet cleaning, or other appropriate methods; or
 - (D) Any other reasonable restriction that would leave the housing accommodation in the condition it was in prior to the occupancy of the tenant with a disability, except for reasonable wear and tear;
- (2) To solicit or require as a condition of engaging in a real estate transaction that the buyer, renter, or lessee be tested for human immunodeficiency virus (HIV) infection;
- (3) To refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person with a disability equal opportunity to use and enjoy a housing accommodation, including public and common use areas; or

Example:

Kanoa Gardens is a three hundred unit apartment complex with four hundred fifty parking spaces which are available to tenants and guests on a "first come first served" basis. Paul applies for housing in Kanoa Gardens. Paul has a mobility impairment and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. It is a violation of the law for the owner or manager of Kanoa Gardens to refuse to make this requested accommodation. Without a reserved space Paul may not be able to live in Kanoa Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford Paul an equal opportunity to use and enjoy a housing accommodation. The requested accommodation is reasonable because it is feasible and practical because of the number of unassigned parking spaces available.

- (4) To refuse to permit, at the expense of a person with a disability, reasonable modifications of existing premises, occupied or to be occupied by the person, if the proposed modifications may be necessary to afford the person with a disability full enjoyment of the premises.

Example:

A tenant with a disability asks an owner or manager for permission to install grab bars in the bathroom at his or her own expense. It is necessary to reinforce the walls with blocking between studs in order to affix the grab bars. It is unlawful for the owner or manager to refuse to permit the tenant, at the tenant's own expense, from making the modifications necessary to add the grab bars.

An owner, any other person engaging in a real estate transaction, real estate broker, or salesperson may grant permission for a modification on the condition that the person with a disability give:

- (A) A reasonable description of the proposed modifications;
- (B) Reasonable assurances that the modifications will be done in a workmanlike manner and that any required building permits will be obtained; and
- (C) Reasonable assurances that the person with a disability will restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted; however, restoration will not be necessary of those modifications which do not interfere with the owner's or next tenant's use and enjoyment of the premises.

Example:

An owner or manager may require the creation of an escrow fund and the payment of money into the fund to cover the costs of restoring the premises. Any portion of the fund, including interest, that is not required for the restoration of the premises will be reimbursed to the person with a disability, who paid into the fund, within a reasonable time.

Example:

If a person with a disability receives permission to put in grab bars and widen the doorway, it is not necessary to remove the blocking or narrow the doorway to restore the premises because the reinforced walls and wider doorway will not interfere with the owner's or next tenant's use and enjoyment of the premises. However, the tenant can be required to remove the grab bars and restore the wall to the condition that existed before the modification, reasonable wear and tear excepted.

(b) All covered multifamily housing accommodations, designed and constructed for first occupancy after March 13, 1991, shall:

- (1) Be designed and constructed to have at least one accessible entrance, unless it is impractical to do so because of the terrain or unusual characteristics of the site; and

Example:

A real estate developer plans to construct six covered multifamily housing accommodations on a site with a hilly terrain. Because of the terrain, it will be necessary to climb a long and steep stairway in order to enter the dwellings. Since there is no practical way to provide an accessible route to any of the housing accommodations, one need not be provided.

- (2) If built with an accessible building entrance, be designed and constructed in such a manner that:
 - (A) Public use and common use portions of the housing accommodations, including recreation and laundry rooms, are accessible to and usable by persons with disabilities;
 - (B) All doors designed to allow passage into and within all premises are sufficiently wide to allow passage by persons who use wheelchairs;
 - (C) All premises contain an accessible route into and through the housing accommodation;
 - (D) Light switches, electrical outlets, thermostats, and other environmental controls are in accessible locations;

- (E) Reinforcements in the bathroom walls allow later installation of grab bars; and
- (F) Kitchens and bathrooms are accessible to persons who use wheelchairs.

Example:

A developer plans to construct a one hundred unit condominium apartment building with one elevator. In accordance with the law, the building has at least one accessible route leading to an accessible entrance. All one hundred units are covered multifamily housing accommodations and they all must be designed and constructed so that they comply with the accessibility requirements of the law.

For purposes of this subsection, a multifamily housing accommodation shall be deemed to be designed and constructed for first occupancy on or before March 13, 1991, if it is occupied by that date or if the last building permit or renewal thereof for the covered multifamily housing accommodation is issued by a state, county or local government agency on or before June 15, 1990. Accessibility will be determined based upon ANSI A117.1-1986 or the Fair Housing Accessibility Guidelines. The burden of establishing impracticality because of terrain or unusual site characteristics is on the owner, person engaging in a real estate transaction, or real estate broker or salesperson. [Eff 10/15/93; am 5/3/99] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-3)

§12-46-307 Discrimination on the basis of familial status. It is a discriminatory practice for an owner or any person engaging in a real estate transaction, or for a real estate broker or salesperson to:

- (1) Refuse to engage in a real estate transaction with a person because of familial status;
- (2) Impose house rules, by-laws, or other provisions, established by a condominium association, cooperative association, apartment complex tenants', owners', or leaseholders' association, or any other organization or association, which by intent or effect discriminate against a person because of familial status;

Example:

House rules (e.g. "two person limit to a bedroom") which have the effect of discriminating ("adverse impact") against persons with children (because the overall square footage is large enough under housing code for three persons) are unlawful unless the rule can be justified by establishing a business necessity. House rules (e.g. "no families with children") which intentionally discriminate against persons with children are unlawful unless there is a specific exemption for the rule under this subchapter or sections 515-4 or 515-8, HRS.

- (3) Impose occupancy limits on a housing accommodation sought by a person because of familial status, unless such limits are justified by establishing a business necessity;

Example:

A person with children seeking a housing accommodation cannot be denied the accommodation on the basis of an occupancy limit unless it is based upon a compelling and well established public purpose, such as a county building code established to promote public safety, and there are no other reasonable means to serve the same purpose with less discriminatory impact.

- (4) Impose against a person because of familial status, by way of any action to evict, terminate the tenancy, or refuse to engage in a real estate transaction, occupancy limits on a housing accommodation which is currently occupied by such person, unless justified by business necessity by demonstrating that such limits are required by county building codes established to promote public safety, and if the person has asked the owner, person engaging in a real estate transaction, real estate broker, or salesperson to apply for a variance or exemption from the county, the application for variance or exemption has been denied;

Example:

A current tenant whose family size exceeds occupancy limits, which are required by a county building code established to promote public safety, may ask an owner, any person engaging in a real estate transaction, or real estate broker or salesperson to apply for a

variance or exemption to the county building code prior to being evicted from the accommodation. The owner may apply for the variance or authorize the tenant to do so, in which case the owner shall reasonably assist the tenant and provide any necessary documents in the owner's possession. If denied by the county agency, the occupancy limit can be used as the basis to evict. The tenant asking that the exemption be sought can be required to pay any filing fee and associated costs.

- (5) Restrict or prohibit the use by children of common use or public use areas or recreational facilities, unless based upon business necessity;
- (6) Designate separate areas for use by children so as to justify separate areas where children are excluded;
- (7) Require the payment of a higher security deposit, surcharge, or additional fees because of familial status; or
- (8) Require a person to sign a waiver of liability as a condition of occupancy by children. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-3)

§12-46-308 Discriminatory financial practices. It is a discriminatory practice for a person, a representative of such person, or a real estate broker, appraiser, or salesperson, to whom an inquiry or application is made for financial assistance in connection with a real estate transaction or for construction, rehabilitation, repair, maintenance, or improvement of real property, because of a protected basis:

- (1) To discriminate against the applicant;
- (2) To use a form of application for financial assistance or to make or keep a record or inquiry in connection with applications for financial assistance which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination due to the person's protected basis, unless such records are required by federal law;
- (3) To discriminate in the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a housing accommodation, or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or
- (4) To discriminate in the selling, brokering, or appraising

of residential real property. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-5)

§12-46-309 Blockbusting. It is a discriminatory practice for a person, representative of a person, real estate broker, appraiser, or salesperson for the purpose of inducing a real estate transaction because of a protected basis:

- (1) To represent that a change has occurred or will or may occur in the composition of the owners or occupants in the block, neighborhood, or area in which the real property is located; or
- (2) To represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of the schools in the block, neighborhood, or area in which the real property is located; if such person, representative, broker, appraiser, or salesperson may benefit financially from the transaction, regardless of actual financial gain. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-7)

§12-46-310 Prohibited interference, coercion, or intimidation. It is a discriminatory practice for a person, or for two or more persons to conspire:

- (1) To retaliate, threaten, or discriminate against a person because of the exercise or enjoyment of any right granted or protected by this subchapter, or because the person has opposed a discriminatory practice, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this subchapter;
- (2) To aid, abet, incite, or coerce a person to engage in a discriminatory practice;

Example:

A newspaper by publishing an advertisement which states a preference based upon a protected basis has aided a person engaging in a discriminatory practice.

- (3) To interfere with any person in the exercise or enjoyment of any right granted or protected by this subchapter or with the performance of a duty or the exercise of a power by the commission;
- (4) To obstruct or prevent a person from complying with this

- subchapter or an order issued thereunder;
- (5) To intimidate or threaten any person engaging in activities designed to make other persons aware of rights granted or protected by this subchapter or encouraging such other persons to exercise such rights; or
 - (6) To threaten, intimidate, or interfere with persons in their enjoyment of a housing accommodation, or visitors or associates of such persons, because of the person's protected basis. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-16)

§12-46-311 Other discriminatory practices. (a) An attempt to commit, directly or indirectly, a discriminatory practice is a discriminatory practice.

(b) A party to a conciliation agreement made under chapter 515, HRS, or this subchapter, who violates the terms of such agreement, has committed a discriminatory practice. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §§515-17, 515-18(b))

§12-46-312 Restrictive covenants and conditions. (a) Every provision in an oral agreement or a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, use, or lease thereof to individuals because of their protected basis is void.

(b) Every condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property because of a protected basis is void, except a limitation, on the basis of religion, in the use of real property held by a religious institution and used for religious or charitable purposes.

(c) It is a discriminatory practice to insert in a written instrument relating to real property a provision that is void under this section or to honor such a provision in the chain of title. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-6)

§12-46-313 Exemptions. (a) Sections 12-46-305, 306, and 307 do not apply:

- (1) To the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other if the lessor resides in one of the two housing accommodations; or
- (2) To the rental of a room or up to four rooms in a housing accommodation by an individual if the individual resides

therein.

(b) Nothing in this subchapter regarding familial status or age shall apply to housing for older persons as defined by 42 U.S.C. section 3607(b)(2). [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-4)

§12-46-314 Religious institutions. It is not a discriminatory practice for a religious institution in a real estate transaction conducted for charitable or religious purposes to give preference to members of the same religion. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §515-8)

§12-46-315 Public contractors. (a) In the case of a respondent who is found by the commission to have engaged in a discriminatory practice in the course of performing under a contract or subcontract with the State or a county, or agency thereof, if the discriminatory practice was authorized, requested, commanded, performed, or knowingly or recklessly tolerated by the board of directors of the respondent or by an officer or executive agent acting within the scope of the officer's or agent's employment, the commission shall mail or serve a certified copy of a commission decision finding that respondent has engaged in a discriminatory practice to the contracting agency. Unless the commission's finding of a discriminatory practice is reversed in the course of judicial review, the finding of discrimination is binding on the contracting agency.

(b) Upon receiving a certified copy of the decision under subsection (a), a contracting agency may take appropriate action to:

- (1) Terminate a contract, or portion thereof, previously entered into with the respondent, either absolutely or on condition that the respondent carry out a program of compliance with this subchapter; and
- (2) Assist the State and all counties, and agencies thereof, to refrain from entering into further contracts, or extensions or other modifications of existing contracts, with the respondent until the commission is satisfied that the respondent will carry out policies in compliance with this subchapter. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §§515-13(c), 515-19)

§12-46-316 Responsibility for discriminatory practices. A person may be liable for discriminatory practices made unlawful under this subchapter including, but not limited to, the following situations:

- (1) An owner, any person engaging in a real estate

transaction, or a real estate broker or salesperson is liable for any of its acts which constitute a discriminatory practice under this subchapter.

- (2) An owner, any person engaging in a real estate transaction, or a real estate broker or salesperson may be liable for the acts of agents or persons acting on their behalf regardless of whether the specified acts were authorized or even forbidden, if the owner, any person engaging in a real estate transaction, or a real estate broker or salesperson knew or should have known of their occurrence. The commission will examine the circumstances of the particular agency or employment relationship and job functions of the person in determining whether the person acted as an agent or on behalf of the owner, any person engaging in a real estate transaction, or a real estate broker or salesperson. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §§515-1, 515-2, 515-3, 515-5, 515-6, 515-7, 515-9(7), 515-16, 515-17, 515-20)

§12-46-317 Causation standard. In determining whether a discriminatory practice constituting disparate treatment has been committed under this subchapter, it must be shown by a preponderance of the evidence:

- (1) That a causal connection existed between a person's protected basis and the alleged discriminatory conduct; and
- (2) That the protected basis was any part of the reason for the conduct. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp: HRS §§515-1, 515-2, 515-3, 515-5, 515-6, 515-7, 515-9(7), 515-16, 515-17, 515-20)

§12-46-318 Defenses. (a) **Adverse impact.** It may be a defense to a claim that a facially-neutral practice, policy, or action has the effect of discriminating against a person because of a protected basis for an owner, any other person, real estate broker, or salesperson charged with discrimination to establish that there is a business necessity for the practice, policy, or action.

(b) **Specific activity permitted.** It may be a defense to a claim that a practice, policy, or action discriminates against a person because of a protected basis for an owner, any other person, real estate broker, or salesperson charged with discrimination to establish that the alleged discriminatory practice, policy, or action is specifically permitted under this subchapter or by sections 515-4 or 515-8, HRS. [Eff 10/15/93] (Auth: HRS §§368-3; 515-9(7)) (Imp:

HRS §§515-1, 515-2, 515-3, 515-4, 515-5, 515-6, 515-7, 515-9(7),
515-16, 515-17)